Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HUGH CHALMERS MOTORS, INC.,
Petitioner,

v.

GULF STATES TOYOTA, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where the Circuit Court of Appeals finds as a matter of law, in an alleged case of antitrust conspiracy between two defendants, that no such conspiracy existed, but that a conspiracy or requisite combination did exist between one of the defendants and the plaintiff, should not the plaintiff be allowed to proceed on this alternative valid theory rather than suffer dismissal if timely request is made?

May the Circuit Court of Appeals resurrect the "Theory of the Pleadings" doctrine, abolished by the Federal Rules of Civil Procedure, to dismiss a complaint, on the grounds that the plaintiff cannot change its theory of liability in the case and that alternative theories of recovery would be disallowed even where the Court finds the alternative theory to be valid?

Where an automobile dealership sues its franchisor for antitrust violations and for violation of the Automobile Dealers Day in Court Act, and where the antitrust claims are dismissed on grounds of lack of conspiracy, should not the Dealers Day in Court Act Claim be unaffected by the ruling on the antitrust claims since the Dealers Day in Court Act contains no conspiracy requirement?

PARTIES TO THE PROCEEDING

Petitioner

Hugh Chalmers Motors, Inc., formerly known as Hugh Chalmers Toyota, Inc. The petitioner corporation is owned by Janelle Chalmers and Hugh B. Chalmers, Jr.

Respondent

Gulf States Toyota, Inc. has no known parent companies or non wholly-owned subsidiaries.

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 184 F.3d 761 (8th Cir. 1999). A copy of the opinion is included in the Appendix at Appendix A at 1a - 5a. The Opinion of the District Court for the Eastern District of Arkansas is included in Appendix C at 10a - 34a. The District Court final judgment denying reconsideration is included in Appendix B at 6a - 9a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on July 15, 1999 (Appendix A). Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc on August 5, 1999 (after a court-approved, one-week filing extension) which rehearing the United States Court of Appeals denied on September 2, 1999 (Appendix D at 35a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing.

The Court's jurisdiction in invoked pursuant to 28 U.S.C. §§ 1254(i) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, § 8 (Commerce Clause).

> "The Congress shall have the Power . . . To regulate Commerce with foreign nations, and among the several states . . ."

15 U.S.C. §1 (Section One of the Sherman Antitrust Act)

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

15 U.S.C. §1221(a)(e) (Automobile Dealers Day In Court Act)

§ 1221. Definitions

As used in this Act

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

* * *

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, that recommendation, endorsement,

exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

15 U.S.C. §1222:

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after the passage of this Act [enacted Aug. 8, 1956] to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, cancelling, or not renewing the franchise with said dealer; Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of such action the failure of the dealer to act in good faith.

STATEMENT OF THE CASE

This case involves the rise and fall of the noble Chalmers family of West Memphis, Arkansas, the once-proud owners of the oldest Toyota dealership in Eastern Arkansas, who were financially destroyed by 1996 by the ten-year long existence of a tying arrangement imposed upon the family-owned Toyota dealership by respondent, Gulf States Toyota, Inc.

Toyota Motor Corporation sells its vehicles in the United States through twelve regional distributors. Historically, these twelve distributorships were privately owned, but over the years the manufacturer reacquired ten of these twelve distributors resulting in a dual distributor system, whereby Toyota sells directly to its dealers in 40 states, and indirectly through its two remaining distributors, Southeast Toyota, Inc. (in the five-state Southeast) and Gulf States Toyota, Inc. (in Arkansas, Texas, Oklahoma, Louisiana and Mississippi). To increase profits, both Southeast Toyota and Gulf States Toyota began in the mid-1980's to require their dealers to purchase unwanted post-installed add-ons as a condition of purchasing the vehicle itself.

Southeast Toyota was successfully sued for illegal tying arrangements resulting in a number of multi-million dollar verdicts, forcing Southeast Toyota to discontinue the tying arrangements. Gulf States Toyota, however, has never been successfully sued and so it continues to this day, earning profits in excess of $50 million per year from its tying scheme. Petitioner, Hugh Chalmers Motors, Inc. was a franchised dealer of the respondent distributor, Gulf States Toyota, Inc. from 1976 to 1996 in West Memphis, Arkansas.

Petitioner, Hugh Chalmers Motors, Inc. eventually brought suit in the state courts of Arkansas in 1993, alleging that Gulf States Toyota committed fraud and state antitrust law violations by conducting the tying arrangement. The Arkansas Supreme Court dismissed the Chalmers' fraud claims on summary judgment on the grounds of statute of limitations (since Arkansas does not recognize the continuing tort doctrine), while the state antitrust claims were dismissed on grounds of exclusive Federal jurisdiction, since the court held that "interstate commerce" was involved, *Chalmers v. Toyota*, 935 S.W.2d 258, 263-264 (Ark. 1996).

Chalmers then brought four separate antitrust claims in this case in the District Court of Arkansas in order to have the antitrust claims heard before the Court of competent jurisdiction. Chalmers also brought an additional claim under the Automobile Dealers Day in Court Act alleging bad faith and coercive action by Gulf States Toyota, Inc. (threatening to withhold vehicles unless unwanted products were bought, threatening to destroy the dealership in retaliation for filing the state court lawsuit). (*See* Appendix H (Complaint) ¶¶ 45, 46 and 59) (*See* Appendix F, pp 42a, 44a; Appendix G, 47a-48a; Affidavits in the District Court). In order to avoid the *res judicata* defense to the Automobile Dealers Day in Court Act claim, the complaint was limited to actions committed by Gulf States Toyota, Inc. after the state lawsuit was filed. *See Chalmers v. Toyota,* 184 F.3d at 764, Appendix A at 5a. Chalmers sued both Gulf States Toyota, Inc. and its franchisor, Toyota Motors Sales USA (Toyota Motor Company's operating entity in the United States), on the grounds that paragraph 7 of the contract between the defendants gave Toyota Motor Sales USA the right to control Gulf States Toyota's tying arrangements, such that joint liability should lie.

The District Court dismissed Chalmers' complaint on the grounds of statute of limitations, overruling Chalmers' argument that since this case involved a *continuing* tort, the result should be different than with the state court lawsuit, since Arkansas does not recognize the continuing tort theory (see *Chalmers v. Toyota* at 263-264), while federal courts do adopt the continuing tort doctrine (*See Chalmers v. Toyota,* 184 F.3d at 763). The District Court also found, as a matter of law, that there was no genuine issue of material fact that the two defendants did not conspire with each other and dismissed the complaint for this reason as well, despite Chalmers citation to the District Court of the case of *Perma-Life v. International Parts Co. and Midas Mufflers, et al.*, which held that even without multiple defendants, in a tying case, the relationship of the seller (Gulf States Toyota, Inc., in this case) and the buyer (Chalmers) constituted a combination in restraint of trade in order to satisfy the plurality requirement such that an independent action could lie against an individual defendant. The District Court did not follow the *Perma-Life, (Midas)* case, ruling instead that a conspiracy between the two defendants was required. See District Court Order of January 21, 1998, Appendix C.

The Eighth Circuit Court overruled the District Court on the basis of the continuing tort doctrine. *See Chalmers v. Toyota* at 763; Appendix A at 2a-3a. The Eighth Circuit, apparently following *Perma- Life*, ruled that the facts as alleged, supported a claim against Gulf States Toyota, Inc., but not against Toyota Motor Sales USA. *Id.* at 3, n.1. Nonetheless, the Panel ruling affirmed the summary judgment as to Gulf States Toyota, Inc. as well, on the grounds that the legal theory of recovery stated in the complaint had alleged both defendants were liable and failed explicitly to state that plaintiff wished to proceed against Gulf States Toyota, Inc. alone, should Toyota Motor Sales USA be dismissed from the

case. The exact language of the Eighth Circuit Decision in pertinent part reads as follows:

> Though the facts as alleged may have supported an antitrust claim against Gulf States Toyota alone, the complaint fails to propose any such a cause of action. Even under the minimal requisites of notice pleading *see* Fed. R. Civ. P. 8(a); *Independent Bus. Forms, Inc. v. A-M Graphics, Inc.* 127 F.3d 698 702 (8th Cir. 1997), Chalmers fails to set forth an independent allegation against GST. We have carefully examined the complaint and are unable to conclude that Chalmers has alleged that GST acting alone engaged in unlawful tying practices. Absent such an allegation, GST had no notice that Chalmers sought relief on such theory *See Tatum v. Iowa*, 822 F.2d 808 (8th Cir. 1989) (*per curiam*) (stating that "[w]hile all pleadings are to be construed to do substantial justice, *see* Fed. R. Civ. P. 8(f), the pleading must at a minimum be sufficient to give the defendant notice of the claim") (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957). *Id.* at 763, n.1.

Counsel brought this petition upon the belief that if this Court will review the Eighth Circuit Decision, this court will conclude that this decision is inconsistent with dismissal of Counts One (the Tying Claim) and Five (Automobile Dealers Day in Court Act) against Gulf States Toyota, Inc.. The Eighth Circuit held that the alleged facts supported a claim against Gulf States Toyota, Inc. alone, but that the theory of liability under the complaint involved joint liability. Under such circumstances, petitioner contends, this Court has

always allowed a plaintiff to proceed on the viable alternative theory of recovery even if not originally pleaded, if such theory was timely raised by post-complaint motion, notice, response, or the like, pursuant to the case of *Foman v. Davis*, 371 U.S. 178, 181-182 (1962).

Although petitioner does not agree that the two original defendants did not conspire, petitioner has abandoned its claim against Toyota Motor Sales USA in order to focus attention on the claim against Gulf States Toyota, Inc., which the Eighth Circuit ruled to have been valid, and yet dismissed nonetheless.

The petitioner asserts that in timely motions before the District Court, and subsequently before the Circuit Court of Appeals, that the valid alternative theory was asserted in a timely fashion. The issue therefore is whether alternative theories of recovery, in antitrust cases, will be allowed by motion, filed after the filing of the complaint, if the alternative would be denial of a trial on the merits.

ARGUMENT FOR GRANTING THE WRIT

There is no factual dispute regarding the existence of the tying arrangements imposed upon the Petitioner, Hugh Chalmers Motors, Inc. (Chalmers) by its franchisor, Gulf States Toyota, Inc ("GST"). GST's sales manager testified by affidavit that add-on products were required to be purchased from GST as a condition of Chalmers' dealership receiving the underlying vehicles. (App. F) The lower courts assumed these allegations to be true as required by Rule 56 of the Federal Rules of Civil Procedure; *Conley v. Gibson*, 355 U.S. 41 (1957), *Poller v. CBS*, 368 U.S. 464 (1962) and yet dismissed the complaint anyway.

The District Court dismissed the complaint despite the allegations by ruling (1) the continuing tort doctrine did not apply, and therefore the 10-year continuation of the practice could no longer be challenged due to limitations and (2) that a conspiracy between defendants was required despite Chalmers' timely proffer of the alternative antitrust theory that allows the relationship between seller (defendant) and buyer (plaintiff) in a tying case to satisfy the conspiracy or combination requirement of the antitrust statutes pursuant to *Perma-Life Mufflers v. International Parts Corp.; Midas Muffler Corp, et al*, 392 U.S. 134, 142 (1968). The District Court ruled there must be a conspiracy between at least two defendants; the District Court failed to indicate why the rule in *Perma-Life* was not considered. On appeal to the Eight Circuit Court of Appeals, Chalmers relied almost exclusively upon the *Perma-Life* case in pursuing individual claims of liability on a plaintiff-defendant combination theory. *See* Appendix F and G.

The Eighth Circuit Court of Appeals agreed with Chalmers that the continuing tort doctrine applied and overruled the District Court's dismissal of the case on limitations grounds. *Chalmers v. Toyota* at 763, Appendix A. The Eighth Circuit also overruled the District Court's conspiracy ruling finding that Chalmers had alleged facts that would have supported an antitrust claim against GST alone. *Id.* at 763 n.1, Appendix 4a, n.1. But the Eighth Circuit dismissed the antitrust claims as to GST anyway, solely because the complaint itself was not worded in such a way as to indicate "that GST acting alone engaged in unlawful tying practices." The Eighth Circuit stated, "Absent such allegation, GST had no notice that Chalmers sought relief on such a theory." *Id.*

Petitioner Chalmers seeks this writ based upon the failure of the Circuit Court of Appeals (1) to consider the other pleadings and motions filed after the complaint which clearly asserted individual liability against GST and put GST on clear notice and (2) to consider GST's own filings which demonstrated not only notice to GST, but a clear understanding by GST as to what the individual allegations against it were; and (3) to allow the pleadings to be amended to conform to the allegations, which allegations were determined to be factual sufficient, especially since Chalmers had requested and reserved leave to amend.

I.

The Federal Rules of Civil Procedure Allow Alternative Theories of Recovery If Sufficient Facts are Alleged in Support of the Alternate Theory.

The "Theory of the Pleadings" doctrine which holds a litigant to a single position has been abolished. As this Honorable Court has stated many times, a complaint should not be dismissed for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). In this case, the Eighth Circuit acknowledged that "the facts as alleged" supported an antitrust claim against GST, and yet, because of what was perceived to be a technical failure in the original complaint as to whether the theory of liability was joint or several, the Eighth Circuit Court of Appeals dismissed all claims, even though a simple amendment to the complaint would have easily cured the alleged technical defect, to no prejudice to the respondent.

This is in direct conflict with this Court's holding that "'notice pleading' is made possible by the opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense. . . ." *Conley v. Gibson*, at 47-48. Therefore, the Eighth Circuit's failure to consider Chalmers' alternative legal theory, that no conspiracy between defendants need be proven because a combination existed between GST and Chalmers, which theory was repeatedly stated during "the other pre-trial procedures established by the Rules" by motion, brief, and affidavit, constitutes clear error.

As was held in *Conley*,

> "Following the simple guide of Rule 8(f) that all pleadings shall be so construed as to do substantial justice, we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondent's fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principal that the purpose of pleading is to facilitate a proper decision on the merits." *Id.*

See also Foman v. Davis, 371 U.S. 178, 181-182, (1962) which held:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed 1948) If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief,

> he ought to be afforded an opportunity to test his claim on the merits." *Id.* . . . The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. . . . the amendment would have done no more than state an alternative theory for recovery. Outright refusal to grant leave to amend without reason is abuse of discretion. *Id.*

Therefore Chalmers Rule 59(e) Motion in the District court to allow the *Perma-Life* rule to be applied would have done no more than state an alternative theory of recovery" and therefore should have been allowed under *Foman v. Davis*. *Id.* In this case the proper course for the Court of Appeals to have taken would have been to allow Chalmers to amend the complaint and proceed on the tying claim against GST alone since the Court of Appeals found the alleged facts supported that claim. The post-complaint motions raised the issue, and no prejudice would have resulted to GST at this stage of the pleadings because no answer to the complaint had even been filed as yet.

Where a franchisee sues multiple franchisor entities for alleged antitrust tying violations, and alleges a conspiracy among the defendants and states sufficient facts to support a claim against one defendant, but suffers a ruling from the court that there is no conspiracy between defendants, said franchisee plaintiff may, even after dismissal by post-trial motion, allege the alternative theory of liability against an individual defendant, if supported by the alleged facts, even if such theory is not specified until post-trial proceedings. *Perma-Life Mufflers, Inc., et al. v. International Parts Corp*, 392 U.S. at 142 (1968).

Parties are not required to state the correct legal theory of relief in order to obtain a remedy. *Bechtel v. Robinson*, 886 F.2d 644, (3rd Cir. 1989). Legal theories need not be pled in the complaint and mischaracterization of the correct legal theory is not fatal. *Electrical Const. and Maint. Co. v. Maeda Pac. Corp.*, 764 F2d 619, (9th Cir. 1985); *Ramirez v. Garcia*, 898 F.2d 224 (1st Cir. 1990). If a plaintiff's allegations do not support the particular theory advanced in the complaint, the Court is under a duty to examine the complaint to determine if the alleged facts provide for relief on any possible theory. The question is whether in the light most favorable to the plaintiff, the facts support any valid claim under any theory. *Jackson Sawmill Co. v. U.S.*, 580 F.2d 302, 306 (8th Cir. 1978) citing *Bramlett v. Wilson*, 494 F.2d 714, 716 (8th Cir. 1974). A complaint should be dismissed for failure to state a claim only in the unusual case where the plaintiff can prove no set of facts that would entitle him to relief, and where the complaint, on its face shows some insuperable bar to any relief. *Parnes v. Gateway 2000, Inc.*, 122 F.3d 439 (8th Cir. 1997); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir 1982); *Leimer v. State Mut. Life Assurance Co.*, 108 F.2d 302, 306 (8th Cir. 1940). A plaintiff need not allege the correct legal theory on which he relies. He is to be granted any relief to which he is entitled under the facts even though he has not demanded it. *Hostrop v. Board of Jr. College* 523 F.2d 569, 581 (8th Cir. 1975).

The allegations made by Chalmers were sufficient in that it was alleged that GST engaged in numerous illegal acts, including employing coercive methods and extortion to require dealer acceptance of "options" and accessories neither ordered nor wanted by the dealer or customers which generated Fifty Million Dollars ($50,000,000) annual profit for GST, and that GST required Chalmers, as a condition of buying automobiles from Toyota, to purchase certain port

installed "add-ons" against its will through force and coercion, including such valueless add-ons as "consumer protection packages" and "undercoating." *See* Affidavit of Nikolakakis, GST Sales Manager, Appendix F, 44a; Appendix G, 47a-48a; Appendix H, 52a-53a. Despite the fact that these allegations stated a claim for tying violations, the Court of Appeals concluded, "Though the facts as alleged may have supported an antitrust claim against GST alone, *the complaint fails to propose any such a cause of action*". *Chalmers v. Toyota* at 763, n. 1. The court failed to explain why the reservation of the right to amend and the proposal of a claim against GST in the motions and briefs were being ignored. The Court of appeals never explained why Chalmers was not being allowed the same rights as the plaintiffs in *Perma-Life* or *Foman v. Davis*.

This Court of Appeals overlooked the fact that individual allegations against GST were made, and that the individual liability theory did not have to be pled in the complaint to be pursued later pursuant to the Rules of Civil Procedure, *Perma-Life* and *Foman v. Davis*.

Furthermore, the District Court clearly understood the tying allegations when it stated:

> "TYING ARRANGEMENTS. Plaintiff first alleges that since 1986, tying arrangements have existed. Generally, a tying arrangement is the sale of one item on the condition that the buyer purchase a second item from the same source. *See Marts v. Xerox, Inc.*, 77 F.3d 1109 (8th Cir. 1996). Such arrangements can constitute an unreasonable restraint of trade and violate the Sherman Act. *See Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d

1137 (10th Cir. 1997). Plaintiff offers the following allegations in support of the count: Specifically, the plaintiff. . . [was] . . . required, as a condition of buying automobiles from Toyota, to purchase certain port installed "add-ons" against [its] will through force and coercion, such add-ons as "consumer protection packages" and "undercoating," etc., all of which could be installed by the dealer at much lower cost by commerce with other competitors in the relevant [market]. . . " District Court Opinion, Appendix B, 20a.

In addition, GST itself clearly understood the tying allegations that pertained specifically to GST, as can be seen from GST's own words in its Opening Brief, "Chalmers. . . attempts to characterize each allocation of vehicles *by GST*, as an overt act involving trying. . ." GST Eighth Circuit Opening Brief p.7 (emphasis added).

GST went on to divulge that it understood "the gist" of Chalmers claim to be:

> "That each vehicle allocation <u>by GST</u> from April 1993 forward included. . . alleged wrong doing, including. . . the inclusion of unnecessary and unwanted options that could not be deleted. . . [and that] the previous affidavit of Hugh Chalmers...contained identical allegations of. . . adding unwanted options that could not be deleted. . ." GST Eighth Circuit Opening Brief p.13. (emphasis added).

GST then went on to conclude that these *individual* allegations against it were *cumulative* of the allegations in the *Complaint*, (Appendix H, ¶¶34, 38 and 43) demonstrating that GST understood what its individual participation was alleged to be, and had adequate notice based upon the Complaint and other pleadings.

Even if the theory of lone liability by GST was not included in the Complaint, it was clearly referred to elsewhere in the pleadings, and since the Motion to Dismiss was treated as a Motion for Summary Judgment (with additional attachments, affidavits, pleadings, transcripts and other evidence being considered pursuant to Rule 56), the Court of Appeals should not only have considered the bare allegations of the complaint, but also those facts alleged in other pleadings and documents filed with the District Court. *Reed v. Board of Educators*, 460 F.2d 824, 826 (8th Cir. 1972) citing Fed. R. Civ. Pro. 56. Since additional evidence was received from GST in the Summary Judgment stage, Chalmers' submissions must, in all fairness, also be considered. Fed. R.Civ. Pro. 56.

Chalmers clearly raised the issue of individual defendant liability by citing the case of *Perma-Life Mufflers v. International Parts Corp; Midas Muffler, et. al.* As Chalmers clearly stated to the District Court:

> "Even had there been no evidence of a conspiracy presented. . . the relationship between the Defendant GST *and the Plaintiff* itself constitutes a combination of two distinct parties which automatically meets the requirements of the Sherman Act. In tying arrangement cases, the Courts have consistently held that the relationship between

> the wrongdoing seller (GST here) and the coerced buyer (Chalmers here) in effect constitutes a "combination" as required by the Sherman Act. As such, the conspiracy requirement is rarely ever an issue in tying arrangement cases and could not be grounds for dismissal." Chalmers Motion filed in District Court February 2, 1998, ¶3A(ii), Appendix G.

Clearly, the alternative theory of GST individual liability for tying violations was alleged in pleadings and motions, and this should have caused the Eight Circuit Court of Appeals to reverse as to the tying claim against GST.

Clearly evident in the Eighth Circuit decision is the holding that the Complaint alleged sufficient facts to state a claim for recovery, just not under the correct legal. By virtue of the finding that the facts warranted a claim under the theory employed by this Court against Midas Mufflers, Inc. in *Perma-Life* (seller-buyer combination justifying claim against lone defendant), the Eighth Circuit should have reached the same result as *Perma-Life*. In that case, the plaintiff stated sufficient facts to justify a single-defendant tying claim but the complaint was worded in such a way that only joint liability for tying was alleged. After Summary Judgment in favor of Midas Mufflers, the plaintiff *Perma-Life Mufflers* for the first time adopted the alternative theory of lone defendant liability on account of the seller-buyer combination. *See Perma-Life* at 142. In ruling that alternative theories could be raised for the first time after dismissal this Court stated:

> "In any event each petitioner can clearly charge a combination between Midas

> and himself, as of the day he unwillingly complied with the restrictive franchise agreements, *Albrecht v. Hearld Co.* 390 US 145, 150, n.6, 19 L Ed 2d 998, 1002, 88 S. Ct. 869 (1968); *Simpson v. Union Oil. Supra. Although respondents object that these particular theories of conspiracy now pressed by petitioners were not alleged with sufficient specificity in their complaint, this suggestion is completely without merit.* Our modern rules provide for trying cases to serve the ends of justice and require that pleadings "be so construed as to do substantial justice." Rule 8(f), Fed. Rules Civ. Proc. *The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy." Id.* at 142. [emphasis added].

Therefore, Chalmers must be given as equal a treatment as the petitioner in *Perma-Life* since Chalmers has adopted the same course. Chalmers filed a timely post-trial motion before the District Court pursuant to Fed. R. Civ. P. 59 (e) and 60 raising the *Perma-Life* issue and pointing out to the court that liability against each defendant individually was being sought under the same theory as was used against Midas. Appendix E. By holding that this admittedly valid theory is unavailable because it was not stated in the complaint violates the rule in *Perma-Life* that if the alleged facts support such a theory, that theory can be raised later in a post-trial motion or even on appeal. *Id. See also, Foman v. Davis* at 181-182.

The "Theory of the Pleadings" doctrine had been abolished. *See Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 714 (1979) per Heaney, C.J. A plaintiff, under the current rules, is required to state only the factual basis of the claim not the correct legal theory under which such facts apply. Id. As the Court held:

> "The function of an affirmative federal pleading, under Fed. R. Civ. P. 8(a)(2) is to give the opposing party fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved. 5C. Wright & A. Miller, *Federal Practice and Procedure* §1215 at 108-110 (1969). The "theory of the pleadings" doctrine, under which a plaintiff must succeed on those theories that are pleaded or not at all, has been effectively abolished under the federal rules. *Id.* §1219 at 141-143. *See also Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974). Indeed, under Fed. R. Civ. P. 54(c), except in the case of default, the "final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." As stated in C. Wright & A. Miller, *supra*, "*[t]he federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage*, * * *" provided that such a shift in the thrust of the case does not work to the prejudice of the opposing party. *Id.* §1219 at 145 (footnote omitted). *See Hail v.*

Heyman-Christiansen, Inc. 536 F.2d 908, 909 n.2 (10th Cir. 1976); *Janke Constr. Co., Inc. v. Vulcan Materials Co.*, 527 F.2d 772, 776 (7th Cir. 1976). (Emphasis added.)

The facts here warrant recovery at least as to the tying claim in Count One which is directly on point with *Perma-Life*. The concerted action requirement can be met by any combination or contract in restraint of trade, such as the relationship between seller-buyer in a tying scheme. A conspiracy between defendants is not necessary. *See Systemcare, Inc. v. Wang*, 117 F.3d 1137, 1139-40 (10th Cir. 1997) citing *Perma-Life*.

Reversal of Count One's dismissal as to GST is mandated, based upon the result in *Perma-Life*, and Chalmers' arguments in the briefs pursuant to *Perma-Life* regarding the individual liability of "*each defendant*" (Appendix E, 37a-40a). Chalmers assumed each appellee's fate would be determined individually and referred to each defendant separately. (Chalmers Eighth Circuit Opening Appeal Brief pp. 33-35 and Reply Brief pp. 17-18).

The Eighth Circuit should have invited Chalmers to amend. Had the District Court ruled that the facts were sufficiently alleged, but the wrong theory cited, Chalmers would have immediately amended the complaint to state the theory the Court ruled to be valid. Chalmers reserved the right to amend "as necessary" at ¶65 of the Complaint. Appendix H, 55a. The District Court, however, refused to follow *Perma-Life*, requiring instead a conspiracy between the defendants, such that an amendment to state a theory of individual liability would have been futile because the District Court did not recognize the applicability of the *Perma-Life* rule. Only now, when the claim against GST individually has

finally been recognized by the Court of Appeals as valid, has the possibility of amendment been worthwhile.

Once the District Court's rulings on statutes of limitations and sole defendant liability had been reversed by the Eighth Circuit, precedent required that Chalmers be invited to amend rather than be dismissed since that Court had held:

> "No matter how impossible it may be that the plaintiff can establish the allegations of its complaint, it is, nevertheless entitled to make this attempt. Accordingly, it is generally error to dismiss. . . the complaint without leave to the appellant to amend."

White v. Bond, 720 F.2d 1002,1003 (8th Cir. 1983). Amendment should be allowed unless it would be futile. *Manz v. Parr*, 758 F.2d 1254, 1258-59 (8th Cir. 1985).

Chalmers specifically requested leave to award, both of the District Court (Appendix H, 55a) and the Court of Appeals (Appendix I, 56a, *et seq.*) As a result, the dismissal of all claims without leave to amend cannot be justified. *See, Foman v. Davis* at 182.

Finally, the Court should not dismiss the entire case, but rather should invite the appellant to amend, or at least allow appellant to do so, *even if no request to amend the pleading was made*, unless the amendment would be futile. *See Doe v. U.S.*, 58 F.3d 494 (9th Cir. 1995). Since any amendment before the Eighth Circuit decision would have been futile due to the District Court refusal to recognize *Perma-Life*, such amendment must be allowed now in order for Chalmers to have its day in Court pursuant to *Perma-*

Life. As the Court in *Polich v. Burlington Northern*, 942 F.2d 1467 (9th Cir. 1991) held, dismissal without leave to amend is improper. *See also*, *O'Donnel v. Barry*, 148 F.3d 1126 (D.C. Cir. 1998). The Eighth Circuit correctly found the facts, as alleged, to warrant a claim against GST but affirmed dismissal because Chalmers' attorney had not drafted the complaint to state this alternative theory. This conclusion overlooks established precedent. *See Foman v. Davis* at *Id.*

Ironically, the jurist who authored the Eighth Circuit Opinion in this case, also authored the opinion in *Oglala Sioux Tribe* which held:

> "Pursuant to Rule 8 of the Federal Rules of Civil Procedures, when a party has a valid claim under the facts, he should recover on it regardless of his counsel's failure to perceive the true legal theory at the pleading stage. The "Theory of the Pleadings" doctrine, under which a plaintiff must succeed on those theories are pleaded or not at all has been effectively abolished under Federal Rules. *Oglala Sioux Tribe of Indians v. Audrus*, *supra* at 714, Heaney, C.J.

The Court of Appeals' Decision overlooks this rule and denies Chalmers its day in court because of counsel's drafting style. The alleged liability of Toyota Motor Sales was almost vicarious in nature, on the basis that it had a contractual right to control the GST tying scheme pursuant to paragraph seven of its contract as GST's franchisor. GST was never misled as to the fact that it was GST's own acts that were alleged to be illegal, and not the acts of another on its behalf.

The lower court's ruling, if allowed to stand, in effect, revives the "Theory of Pleadings" doctrine. Counsel therefore petitions this Court to grant the writ in order to secure and maintain uniformity of decisions in this Court and maintain consistency among the Circuits.

II.

The Decisions of This Court in Foman v. Davis and Numerous Decisions of Other Circuit Courts of Appeal are Inconsistent With the Result in This Case.

A troubling trend appears to be developing in American Jurisprudence today where *stare decisis* and precedent have become less important, while the result in the litigation has become paramount, resulting in what can only be described as result-oriented legal analysis which has resulted in the development by lower courts of irreconcilable and contradictory lines of cases, simultaneously, on a single point of law. This case, for example, concerns the issue of whether a technical mischaracterization of the correct legal theory in the original complaint will be considered fatal, or whether timely amendment will be allowed. The Circuits have conflicted over this issue, and at least two circuits, the Seventh and the now the Eighth, have developed two internally inconsistent and opposing lines of precedent so that when dismissal is desired, one line of cases is cited and when amendment is to be allowed, the opposite line of cases is cited.

As stated previously the Federal Rules of Civil Procedure were intended to abolish the "theory of the pleadings" doctrine whereby plaintiffs were required to correctly identify their legal theory. Most circuits follow this

precedent without deviation. *See generally Fitzgerald v. Codex*, 882 F.2d 586 (1st Cir. 1989); *Bechtel v. Robinson*, 886 F.2d 644, (3rd Cir., 1989); *General Dynamics Corp. v. U.S.*, 139 F.3d 1280 (9th Cir 1998); *Northington v. Marin*, 102 F.3d 1564 (10th Cir. 1996); *Evans v. McClain* 131 F.3d 953, (11th Cir. 1997); *Caribbean Broadcasting v. Cable & Wireless*, 148 F.3d 1080 (D.C. Cir. 1998).

However, some circuits have developed a line of contradictory cases whereby pleading a valid claim under an incorrect legal theory was deemed fatal. The Seventh Circuit has held, "Plaintiffs are not required to plead legal doctrine, and instead of asking whether the complaint points to the appropriate statute, a court should ask whether relief is possible under any set of facts that could be established." *Goren v. New Vision*, 156 F.3d 721 (7th Cir. 1998). The Seventh Circuit has held that complaints need not plead law or match facts to every element of a legal theory. *See Bennett v. Schmidt* 153 F.3d 516 (7th Cir. 1998); *Nance v. Vrevegge*, 147 F3d 589 *cert. den.* U.S. 119 (1998).

But at the same time, the Seventh Circuit has held that where the correct theory is not identified by the plaintiff, the Court will not look for the correct theory on his behalf, which obviously would result in dismissal, apparently in contradiction to the line of cases represented by *Goren v. New Vision, supra. See Transamerica Financial Services v. Sykes*, 171 F.3d 553 (7th Cir. 1999).

Now, with the decision in this case, the Eighth Circuit has established two contradictory rules, one repudiating the "theory of the pleadings" doctrine, the other embracing it. The Eighth Circuit Court itself in a recent case decried the practice of some courts of maintaining, simultaneously irreconcilable lines of cases which are then applied arbitrarily

in an apparent result-oriented approach. *See generally, Heating and Air Specialists, Inc.*, 180 F.3d 923, 928-930 (8th Cir. 1999) where the Eighth Circuit held that the Arkansas Supreme Court developed "two apparently separate and opposing line of contract cases." *Cooper v. Cherokee Village*, 236 Ark. 37, 364 S.W.2d 158 (1963) and *Standard Leasing Corp. v. Schmidt Aviation*, 264 Ark. 851, 576 S.W.2d 181 (1979). The Eighth Circuit went on to say that "Arkansas Supreme Court cases . . . have vacillated between the *Cooper* and *Standard Leasing* approaches, generally citing to one case without referencing the other . . ." citing *Cooper* whenever the desired result was to uphold the contract while citing *Standard Leasing* whenever the desired result was to invalidate the contract, thereby maintaining both the majority rule and the contradicting minority rule line of cases simultaneously. *Id.*

The Eighth Circuit further implied what a confusion and disservice this was to Federal courts, attempting to apply the *Erie* doctrine, as well as to litigants in contract cases. *Id.* Now the Eighth Circuit has done in this case the very thing it found so unfair in *Heating & Air Specialists*.

The Eighth Circuit has held

> "[A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precision all elements that give rise to a legal basis for recovery. Finally a complaint should not be dismissed

> merely because the court doubts that a plaintiff will prevail in the action. That determination is properly made on the basis of proof and not merely on the pleadings. The question, therefore, is whether in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint there is some insuperable bar to relief. "

Jackson Sawmill v. U.S., 580 F.2d 302 (8th Cir. 1978) citing *Conley v. Gibson, supra*; and

> Pursuant to Rule 8 of the Federal Rules of Civil Procedures, when a party has a valid claim under the facts, he should recover on it regardless of his counsel's failure to perceive the true legal theory at the pleading stage. The "Theory of the Pleadings" doctrine, under which a plaintiff must succeed on those theories are pleaded or not at all has been effectively abolished under Federal Rules. *Oglala Sioux Tribe of Indians v. Audrus*, 603 F.2d 707,714 (8th Cir. 1979)

But the Eighth Circuit has also held, that even where sufficient facts are pled, that omission of the correct legal theory in the original complaint will result in dismissal without leave to amend. *Tatum v. Iowa* 822 F2d 808, 810 (8th Cir. 1987) citing *Martin Trigona v. Stewart*, 691 F.2d 856, 858 (8th Cir. 1982); and now in *Chalmers v. Toyota*, 184

F.3d. 761, 763-64 (8th Cir. 1999) the Court has dismissed a case (without leave to amend) which it acknowledged to be valid as factually alleged merely because of an initial incorrect theory of liability. This leaves the impression that disfavored litigants will have the rule in *Tatum* or *Chalmers* applied, while favored litigants will receive the benefits of the Rule in *Jackson Sawmill*, and *Oglala Sioux Tribe* and *Transamerica Financial Services*. This implies that litigants such as *Tatum* and *Chalmers* are disfavored while litigants such as *Toyota* and *Transamerica* are favored.

The fact that the published opinions in *Tatum* and *Chalmers* make no mention of or attempted reconciliation of the contrary line of cases represented by *Jackson Sawmill* and *Oglala Sioux Tribe*, despite their citation to the Court in the briefs indicates that a result-oriented approach is being employed. Likewise, despite literally dozens of citations and quotations in the lower court to the *Perma-Life* case, and the shift this court allowed the *Perma-Life* plaintiff to make to the alternate theory of sole defendant liability for illegal tying (once the joint liability theory had failed), neither GST, the District Court, nor the Circuit Court of Appeals ever once acknowledged Chalmers citation to this binding and indistinguishable authority. The lower courts simply ignored this precedent implying a result-oriented approach. If *Perma-Life* was distinguishable, surely, GST somewhere in its briefs would have said so.

Finally, there was no explanation given by the lower courts as to why no amendment was allowed (as requested by Chalmers at paragraph 65 of the Complaint) pursuant to the dictates of *Foman v. Davis*, at *Id.*; *Manz v. Parr*, 758 F.2d 1254, 1258 (8th Cir. 1985); and *White v. Bond*, 720 F.2d 1002,1003 where plaintiffs were allowed to plead more particularly rather than be dismissed.

III.

The Automobile Dealers Day in Court Act (ADDICA) Claim Against Gulf States Toyota, Inc. (GST) in Count Five Should Have Been Unaffected by Dismissal of the Antitrust Claims Since the Basis of the Dismissal of the Antitrust Claims Was Lack of a Conspiracy Between the Defendants and the ADDICA Has No Conspiracy Requirement.

The Court of Appeals ruled that dismissal of the antitrust claims compelled dismissal of the ADDICA claim as well since Chalmers "expressly tied its ADDICA claim to the existence of an antitrust conspiracy." *Chalmers v. Toyota* at 764, Appendix A, 4a.

To the contrary, Chalmers tied its claim to two allegations:

(1) that the prohibition of bad faith coercion under the ADDICA by GST against Chalmers was violated by GST threatening to cut-off vehicle deliveries unless unwanted add-ons were bought as tie-ins; and

(2) that threats made by GST after the filing of the state court action could not be subject to claim preclusion.

The Circuit Court apparently agreed that *res judicata* did not apply and that the only basis for dismissing the threats made by GST after the state court litigation in 1993 (Chalmers continued as a dealer until 1996) was as a dismissal ancillary to dismissal of the antitrust claims. Chalmers tied

its ADDICA claim to the existence of tying arrangements, not necessarily to the existence of an antitrust conspiracy, per se, between the defendants, and since the Court of Appeals acknowledged tying had been pled factually, the claim in Count Five against GST alone should have been preserved. Again, the Eighth Circuit Court of Appeals made no acknowledgment of the case law, and authority, which was stipulated by the parties to be binding, specifically *Fray Chevrolet v. General Motors*, 536 F.2d 683, 685 (6th Cir. 1976), which held that coercion of a dealer to comply with a wrongful demand constitutes a violation of the ADDICA. *Id.* at 685. The Court in *Fray* gave examples of tying (order certain unwanted products or risk being denied desired products) as examples of ADDICA violations. *Id.* Therefore, even if GST acted alone by forcing unwanted tied products upon Chalmers, the case law demanded that this issue proceed to trial on the merits.

In another case under the ADDICA against a Toyota distributor, it was held that where two entities are sued under the ADDICA, but there is no conspiracy or agency that would make either defendant responsible for the acts of the others, one of the Toyota entities may be dismissed, but the Toyota distributor that was the automobile dealer's franchisor would be held accountable under the ADDICA. *See, TLMS Motor Corp. v. Toyota Motor Distributors,* 912 F.Supp 329, 333-334, (N.D. Ill. 1995). Therefore, even though TMS has been dismissed from the case, GST should have remained and not been allowed to ride upon TMS's coattails.

Furthermore, even where some claims are dismissed, those that are valid should stand independently, with each count deserving independent consideration. *See Evanston Motor Co. v. Mid-South Toyota Distribution, Inc.*, 436 F.Supp 1320 (N.D. Ill. 1977), a case under the ADDICA.

The ADDICA was designed to supplement the antitrust laws. *See* 15 U.S.C. § 1224. *Katula v. Ford Motor Co.*, 338 F.2 732 (8th Cir. 1964) *cert. denied* 380 U.S. 797 (1965). The decision in this case making the ADDICA claim dependent upon the antitrust claims defeats this purpose, because the ADDICA cannot supplement the antitrust laws if the court rules the ADDICA is limited to the scope of existing antitrust violations by the franchisor, if any. If you have antitrust violations by the franchisor against the dealer, you would in all likelihood have ADDICA claims as well, but you could easily have ADDICA claims without violating the Sherman Act since there are a number of additional elements in antitrust cases. *See generally, Autowest, Inc. v. Puegot, Inc.*, 434 F.2d 556 (2nd Cir. 1970); and *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3rd Cir. 1992) which held it was error to superimpose antitrust provisions and requirements upon an ADDICA claim. Therefore, the Eighth Circuit erred when it did not follow the example in *TLMS Motors v. Toyota Motor Distributors* where some Toyota defendants and some claims were dismissed, but the valid claims were unaffected. *See, TLMS Motor Co.* at 334. Instead, the Eighth Circuit adopted an unprecedented "all of nothing" approach, dismissing all claims if any at all were dismissed. The defendants should have been on notice from their previous litigations that dismissal, in part, as to some claims and some defendants, was possible, since it happened to them in *TLMS Motors*. Therefore, the Eighth Circuit holding that defendants had no notice that only one of them (and not both) might be dismissed makes no sense.

No analysis was given to the merits of Count Five on its own under the case authority stipulated to by the parties, *Fray Chevrolet v. General Motors, supra*. Since an adequate factual basis for the ADDICA claim was stated by Chalmers in the motions and briefs independently of the antitrust claims,

it was error for the lower courts to consider the ADDICA claim dependent upon the antitrust claims. Count Five against GST should have been reinstated.

CONCLUSION

The path taken by petitioner Chalmers in this case is virtually identical with that of the plaintiff in *Perma-Life*. Both sued their franchisors for illegal tying, alleging a conspiracy between multiple defendants, only to see the District Court find no such conspiracy as a matter of law. Both filed post-judgment motions to vacate, proposing an alternative theory of a plaintiff-defendant combination, which motions were denied. Both then appealed unsuccessfully to their respective Courts of Appeal. Both filed petitions for certiorari with this Court citing *Foman v. Davis*, U.S. 178 (1962) for the proposition that the lower courts erred in ignoring the attempts to assert a valid alternative theory of recovery. The fact, in this case, that none of the lower courts' opinions, despite their length, ever once acknowledged, mentioned or distinguished *Perma-Life* is telling. The fact that respondent never responded to the dozens of citations in the briefs to *Perma-Life* is even more telling.

Pleading alternative theories at recovery has long between recognized as acceptable under the Federal Rules of Civil Procedure, which is why the lower court's decisions to deny Chalmers that right is so puzzling. What is so crucial in dismissing Chalmers' claim, what is so necessary in denying Chalmers' day in court, that binding established precedent must be ignored and obtuse analysis must be employed in order to accomplish the desired result?

To date, this case has been a virtual re-run of the *Perma-Life* case. Petitioner, Chalmers, hopes that this trend continues, and that, as in *Perma-Life*, this petition is granted. Uniformity among the circuits, and even within some circuits, require it. The equal administration of the law, and the concepts of precedent and *stare decisis* demand it. The interests of the law of justice can only be served in this case by granting this petition for a writ of certiorari, and the petitioner humble requests that this Honorable Court do exactly that and thereby respectfully submits this Petition for Writ of Certiorari.

Respectfully Submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed: July 15, 1999]

No. 98-3243

Appeal From The United States District Court
For The Eastern District Of Arkansas

HUGH CHALMERS MOTORS, INC.
Appellant,

v.

TOYOTA MOTOR SALES U.S.A., INC.;
GULF STATES TOYOTA, INC.
Appellees.

Before: BOWMAN, HEANEY, and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

Hugh Chalmers Motors, Inc., a former West Memphis auto dealer, brought action against Toyota Motor Sales, USA, Inc. (TMS) and its independently-owned regional distributor, Gulf States Toyota, Inc. (GST), alleging violation of various federal antitrust statutes based on an illegal conspiracy

involving product tying, price discrimination, restraint of trade and monopolization, and violation of the Automobile Dealers Day in Court Act (ADDICA), 15 U.S.C. § 1221-1225, for threats and coercion in retaliation for an earlier state court action. The district court granted defendants' motion for summary judgment on the ground that the antitrust claims were precluded by the statute of limitations and that the ADDICA claim was barred on both claim preclusion and statute of limitations grounds. We may affirm a district court's judgment on any basis supported by the record. See Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1116 (8th Cir. 1999). Though we disagree with the district court's statute of limitations analysis, we conclude that appellant presented the district court with no genuine material fact supporting the existence of an antitrust conspiracy between TMS and GST and that summary judgment was thus appropriate. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In ruling that appellant's claim was barred by the statute of limitations, the district court determined that appellant's antitrust cause of action accrued on the date that defendants first committed an act injuring appellant's business. See Memorandum and Opinion, at 9-10 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971)). While this statement of the law is generally correct, it is also true that in the context of a continuing violation, such as that alleged in this case, a plaintiff may bring suit on the basis of, and recover damages for, independent predicate acts occurring within four years of suit, regardless of when the initial injury occurred. See Klehr v. A.O. Smith Corp., 521 U.S. 179, 180-81 (1997); Zenith Radio Corp., 401 U.S. at 338; Hanover Shoe, Inc. v. United

Shoe Mach. Corp., 392 U.S. 481, 501 n.15 (1968); Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1051 (5th Cir. 1982) (stating that an antitrust suit may be brought more than four years after events that initially gave rise to action where, among other grounds, there exists "continuing conspiracy or continuing violation") (emphasis added). The antitrust violations alleged in this case did not stem from a "single act," as in Kaiser Aluminum, 677 F.2d at 1052-53, but rather would, if established, constitute overt acts permitting recovery. See Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987) (defining "overt acts" as new and independent acts inflicting new and accumulating injury on antitrust plaintiff).

Even though appellant would be entitled, on the basis of statute of limitations doctrine to bring suit on the basis of a continuing violation, its case contains a more fundamental flaw. Each antitrust count in the complaint alleges an unlawful combination and conspiracy between defendants. However, the record presents no genuine issue of material fact establishing such combination or conspiracy. See Memorandum and Opinion, at 11 (finding, in analyzing question of whether continuing conspiracy exception to statute of limitations applied, that no conspiracy existed between TMS and GST). Rather, appellant merely asserted that there is strong evidence that defendants conspired with one another. Such conclusory allegations are insufficient to avoid summary judgment in Chalmers v. Toyota Motor Sales, USA, Inc., 935 S.W.2d 258 (Ark. 1996). See First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-90 (1968), construed by

Anderson, 477 U.S. at 248-50.[1] We thus affirm the grant of summary judgment as to the antitrust claims.

Appellant also brought suit under ADDICA, 15 U.S.C. §§ 1221-1225, alleging that the various antitrust violations establish a per se violation of good faith as that term is defined at 15 U.S.C. § 1221(e). As an initial matter, we agree with the district court that the ADDICA claim is barred by the claim-preclusive effect of the earlier state court judgment. See Migra v. Warren City School Dist., 465 U.S. 75, 77 n.1, 81 (1984); Gahr v. Trammel, 796 F.2d 1063, 1066 (8th Cir. 1986) (stating Arkansas law of claim preclusion). Appellant knew of the facts underlying this claim at the time it instituted state court action in 1993, see Chalmers, 935 S.W.2d at 259-260, and there is no authority for the proposition that federal district court is the exclusive forum for bringing ADDICA claims, see Tafflin v. Levitt,

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[1] Though the facts as alleged may have supported an antitrust claim against GST alone, the complaint fails to propose any such a cause of action. Even under the minimal requisites of notice pleading, see Fed. R. Civ. P.8(a); Independent Bus. Forms, Inc. v. A-M Graphics, Inc., 127 F.3d 698, 702 (8th Cir. 1997), Chalmers fails to set forth an independent allegation against GST. We have carefully examined the complaint and are unable to conclude that Chalmers has alleged that GST acting alone engaged in unlawful tying practices. Absent such an allegation, GST had no notice that Chalmers sought relief on such a theory. See Tatum v. Iowa, 822 F.2d 808, 810 (8th Cir. 1989) (per curiam) (stating that "[w]hile all pleadings are to be construed to do substantial justice, see Fed. R. Civ. P. 8(f), the pleading must be sufficient to give the defendant notice of the claim") (citing Conley v. Gibson, 355 U.S. 41, 48 (1957)).

493 U.S. 455, 459 (1990) ("'[I]f exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.'") (quoting Caflin v. Houseman, 93 U.S. 130, 136 (1876)).

Nonetheless, appellant contends that it should be able to bring suit for alleged violations occurring within the three-year statute of limitations stated in 15 U.S.C. § 1223-i.e., alleged violations of ADDICA occurring after April 1993, the date the state court action was filed. Because appellant expressly tied its ADDICA count to the existence of an antitrust conspiracy, however, the failure of appellant's antitrust claim compels the conclusion that defendants' actions did not offend the "special, relatively narrow" definition of good faith contained in 15 U.S.C. § 1221(e). Sink v. Ford Motor Co., 549 F.Supp. 245, 249 (E.D. Mich. 1982); see also Hubbard Chevrolet Co. v. General Motors Corp., 873 F.2d 873, 875 (5th Cir. 1989). Accordingly, we also affirm the entry of summary judgment on the ADDICA count.

The grant of summary judgment in favor of defendants is affirmed for the reasons stated herein.

A true copy.

Attest.

/s/_____
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-97-331

[Filed: July 28, 1998]

HUGH CHALMERS MOTORS, INC.
Plaintiff,

v.

TOYOTA MOTOR SALES U.S.A., INC.; and GULF STATES TOYOTA, INC.
Defendants.

ORDER

On January 21, 1998, the Court granted summary judgment in favor of defendants Toyota Motor Sales, U.S.A., Inc. (TMS) and Gulf States Toyota, Inc. (GST) in this suit in which the plaintiff alleged that defendants were engaged in: (1) an illegal tying arrangement; (2) discriminatory pricing; (3) restraint of trade; (4) monopolization; and (5) franchise violation. Summary judgment was granted on all claims.

The plaintiff has filed a Motion to Alter Judgment Under Rule 59(e)[1] or to Set Aside Under Rule 60(b)[2]. The defendants oppose the motion. For reasons which follow, the plaintiff's motion is denied.

The plaintiff originally filed suit against the defendants in the courts of the State of Arkansas. That action was removed to this court by the defendants. Then, at the request of the plaintiff, the action was remanded to the state court on the ground that, as master of its complaint, Hugh Chalmers Motors, Inc. (Chalmers) had chosen not to pursue federal claims. The crux of the plaintiff's claims in the state case revolved around Chalmers' contention that the defendants had created an unfair marketing situation by effecting different pricing policies for Toyota automobiles in the regional

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[1] Rule 59(e) of the Federal Rules of Civil Procedure provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

[2] Rule 60(b) of the Federal Rules of Civil Procedure provides, in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

distributorship which included Memphis, Tennessee and the regional distributorship which included West Memphis, Arkansas.

In the order granting summary judgment, the Court found that the claim of an improper tying arrangement, the claim of discriminatory pricing, the claim of restraint of trade, and the claim that the defendants conspired to monopolize trade were all barred by the four-year statute of limitation because the complained of conduct occurring after April of 1993 (the cut off date for purposes of calculating the statute of limitations) was merely a continuation, or reaffirmation, of acts of which the plaintiff was aware, or should have been aware, years before.

In the current motion and supporting brief, the plaintiff urges the Court to consider new evidence of overt acts which occurred after April of 1993. The Court must reject the plaintiff's "new" evidence. First, the evidence is cannot fairly said to be "newly discovered." The plaintiff concedes in its brief that the "new" evidence — that is, the affidavit of Peter Nikolakakis — "confirms the veracity of the evidence already in the record." (Plaintiff's Memorandum Brief at p. 5). Neither Rule 59 nor Rule 60 opens the door to the presentation of cumulative evidence to bolster evidence already in the record.

Furthermore, even if the Court were to consider the plaintiff's latest submissions, the result of summary judgment in favor of the defendants would not be changed. Nothing in the Nikolakakis affidavit convinces the Court that alleged misconduct occurring after April of 1993 was anything more

than a continuation of the conduct of which the plaintiff was, or should have been, aware of since at least 1986.

Accordingly, the plaintiff's Motion to Alter Judgment is denied this 27th day of July, 1998.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-97-331

[Filed: January 21, 1998]

HUGH CHALMERS MOTORS, INC.
Plaintiff,

v.

TOYOTA MOTOR SALES U.S.A., INC.; and GULF STATES TOYOTA, INC.
Defendants.

MEMORANDUM OPINION AND ORDER

INTRODUCTION. Defendants Toyota Motor Sales USA, Inc. ("TMS") and Gulf States Toyota, Inc. ("GST") have filed motions for summary judgment.[1] After a complete

[1] A motion for summary judgment shall be granted if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. See Nelson v. City of McGehee, 876 F.2d 56 (8th Cir. 1989). The non-moving party,

review of the pertinent pleadings and exhibits, the Court is persuaded that the material facts are not in dispute and the defendants are entitled to judgment as a matter of law. The motions are granted, and judgment will be entered for the defendants.

FACTS. In connection with the submission of the motions, TMS and GST have filed separate statements of undisputed facts pursuant to Local Rule 56.1(a). Plaintiff, Hugh Chalmers Motors, Inc., has responded by filing a statement of disputed facts pursuant to Local Rule 56.1(b). The Court has reviewed the statements and finds that although some facts are in dispute, the relevant facts are not in dispute, or, in the language of Holloway v. Lockhart, 813 F.2d 874 (8th Cir. 1987), the facts affecting the outcome of this lawsuit under the governing substantive law are not in dispute.[2] The

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in opposing the motion, is entitled to receive the benefit of every favorable factual inference, see Holloway v. Lockhart, 813 F.2d 674 (8th Cir. 1987), but "[o]nly disputes over facts that may affect the outcome of the lawsuit under the governing substantive law will properly preclude the entry of summary judgment," see Nelson v. City of McGehee, 876 F.2d at 57. This standard applies even in complex anti-trust cases. See, e.g., Bathke v. Casey's General Stores, 64 F.3d 340 (8th Cir. 1995) (no different or heightened standard for granting summary judgment in complex antitrust cases).

[2] Plaintiff attempts to place some of the relevant facts in dispute, but its attempts are unsuccessful because it has offered mere conclusions without any accompanying support in the record, e.g., ". . . TMS is in direct control of. . . GST, and every other distributor, each of which is a sham corporation or is otherwise controlled by . . .TMS," or [e]very other material fact . . . is, in

Court therefore finds the following facts, some of which the Court adopts from an opinion by the Arkansas Supreme Court:

01. During the relevant period, i.e.,during the years between 1976 and 1996, TMS was the authorized importer and distributor of Toyota products within the continental United States.

02. During the relevant period, the continental United States was divided into a number of multi-state distribution regions with a single distributor serving each region.

03. The regional distributors obtained their Toyota products from TMS.

04. The products were then sold by the regional distributors to the authorized Toyota dealers within the regions.

05. Toyota Motor Distributors, Inc., ("TMD"), a wholly-owned subsidiary of TMS, was-the regional distributor for Tennessee and several other adjoining states until October 1, 1995, a region the parties have referred-to as the Cincinnati Region.

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reality, disputed in this litigation, all as will be evident from a review of the affidavits of Hugh Chalmers and Charles E. Venus, . . ." See Plaintiff's Statement at 01, 02-03.

06. In 1995, TMD merged with TMS, and the latter became the sole distributor of Toyota products in the Cincinnati Region.

07. Plaintiff was, until March of 1996, an authorized Toyota dealer in West Memphis, Arkansas; Hugh Chalmers ("Chalmers") one of plaintiff's principal officers.

08. Because plaintiff was not in the Cincinnati Region, TMS did not provide plaintiff with its Toyota products; the products were instead provided by GST, a privately-owned and independently-managed corporation in which TMS had no ownership interest.

09. GST distributed Toyota products to authorized dealers in Louisiana, Mississippi, Arkansas, Oklahoma, and Texas; it did not distribute Toyota products to dealers in Tennessee, specifically, GST did not distribute Toyota products to the dealers in Memphis, Tennessee.

10. Because it was independently-managed, GST established the price it sold its Toyota products to plaintiff independent of TMS.

11. The Arkansas Supreme Court found the following occurred, which the Court adopts for purposes of this Memorandum Opinion and Order:

> On February 6, 1987, . . . Chalmers wrote a letter to the president of GST expressing dissatisfaction with its vehicle distribution policy. Chalmers complained of an inequitable distribution of Toyotas which had increased over the past several years and

> asserted that TMD and GST were engaged in different marketing strategies. Chalmers complained that Toyota's distribution boundaries resulted in an injustice to his dealership because he could not participate in the programs and promotions advertised by TMD in the Memphis market.
>
> Chalmers later voiced his concerns to TMS. On October 4, 1989, Chalmers wrote a letter to a vice-president of TMS and stated that the Memphis dealership had an unfair advantage because of a dual pricing policy between the two regions and that this discriminatory practice was causing him to lose both new car sales and personnel. In the ensuing years, Chalmers continued to correspond with TMS and GST regarding the difficulties created by the Arkansas-Tennessee boundary.

See Chalmers v. Toyota Motor Sales, USA. Inc., 326 Ark. 895, 935 S.W.2d 258, 260 (1996).

12. The foregoing problems came to a head when plaintiff and others (collectively, "the Chalmers") commenced litigation in an Arkansas state court and joined TMS, GST, and a GST employee as defendants.

13. The Chalmers' complaint contained claims for breach of contract, breach of "implied contractual covenants of good faith and fair dealing," fraud, interference of contract, and separate violations of the Arkansas Unfair

Practices Act ("UPA") and the Arkansas Franchise Practices Act. See Id. at 259.

14. The Arkansas Supreme Court summarized the Chalmers' theory in that proceeding as follows:

> The Chalmers allege that the [defendants] acted conspiratorially and as agents of one another in engaging in the unlawful actions. They allege that TMS allowed GST and [the former GST employee] to force dealers within GST's region to accept vehicles loaded with option and accessory packages not required of the Memphis dealers, and that the resulting pricing disparity destroyed their ability to compete in their economic market. The complaint further asserted that the conspiracy and pricing disparity had begun at an earlier, unknown time but that "the effects were not perceived by the Chalmers until late 1989."

See Id. at 260. [Emphasis added.].

15. The defendants in that case subsequently removed the case to federal court because they understood the Chalmers' complaint to implicate federal jurisdiction, namely, the federal Robinson-Patman Discrimination Act. See Chalmers v. Toyota Motor Sales, USA, Inc., LR-C-93-673 (Woods, J.).

16. The Chalmers filed a motion to remand, a motion opposed by the defendants because they believed that the Chalmers were attempting to defeat federal jurisdiction by

"mislabeling" their claim for interstate price discrimination as a claim under the state UPA.

17. The Court, however, agreed with the Chalmers and remanded the lawsuit to state court; the Court found that the Chalmers, as the masters of their own pleadings, did not allege a federal claim and their complaint could not have been filed in federal court.

18. The trial court later dismissed the complaint because the state UPA did not apply to interstate price discrimination and the remaining claims were barred by limitations. See Id. at 260.

19. The trial court judgment was affirmed on appeal; the state Supreme Court agreed that the state UPA did not apply to interstate price discrimination and the remaining claims, i.e., the tort and contract claims, were barred by limitations.

20. With respect to the contract and tort claims, the Arkansas Supreme Court specifically found the following:

> [The February 6, 1987, letter and the October 4, 1989, letter] clearly show that the alleged wrong occurred at least six years prior to the filing of the complaint in 1993. The letters also demonstrate that the Chalmers knew or through reasonable diligence could have discovered the alleged fraud. Furthermore, Hugh Chalmers, Jr., testified in his deposition taken August 1993, that he was getting accessories on vehicles that he did not

want in 1985, and that he had requested of his GST representative that the accessories not be put on. He further stated that he had been forced to take automobiles he didn't want for the past ten years.

Although Chalmers did not complain of "dual pricing" until the 1989 letter, and asserted in his deposition that he was not aware of the dual pricing until 1989, it is clear from the testimony of the Chalmers' expert, Charles Venus, that the allegation of "dual pricing" is a further reference to the port-installed accessories, which the Chalmers had known of since 1985. Dr. Venus testified in his deposition that a price difference between the Chalmers and the Memphis dealerships averaging almost $500 per vehicle existed from at least 1986 onward, and that a substantial part of the differences between what Chalmers and the Memphis dealers paid for cars was the port-installed "CPP" (consumer protection package). Hugh Chalmers also testified that GST portinstalled at inflated prices floor mats, spare tires and the CPP in "almost every car coming into West Memphis." The evidence thus shows that the alleged wrong occurred even prior to 1987 and that the Chalmers knew or through reasonable diligence could have discovered the alleged fraud and their other causes of action as early as 1987.

See Chalmers v. Toyota Motor Sales, USA, Inc., 935 S.W.2d at 263. [Emphasis added].

21. Within months, plaintiff filed this lawsuit and alleged an illegal tying arrangement, discriminatory pricing, the restraint of trade, monopolization, and a franchise violation.

PLEADINGS. The jurisdictional allegation of the complaint was set forth in paragraph one. Plaintiff represented in the paragraph that the complaint was filed pursuant to the Automobile Dealers Day in Court Act ("ADDICA") and several antitrust acts, i.e., sections 1 and 2 of the Sherman Act; section 77 of the Wilson Tariff Act; section 2 of the Clayton Act, as amended by the Robinson-Patman Act; and sections 3 and 4 of the Clayton Act. A brief summary of the many factual allegations of this complaint is not easy. The following summary provided by TMS is adequate:

> The core allegation . . . is that GST added more accessories to its vehicles that did TMD -- the extra equipment allegedly causing the dealer price of GST vehicles to be higher than the price charged by the Cincinnati Region to its dealers. [Footnote omitted]. [Plaintiff] contends that because the Cincinnati dealers allegedly paid less for their vehicles than did the [plaintiff's] dealership located in the GST Region, the Memphis dealers had an unfair competitive advantage. [Footnote omitted]. [Plaintiff] also contends that its requests to be moved to the Cincinnati Region

> were improperly denied by Defendants. [Footnote omitted].

See Memorandum of TMS at 05-06. Anticipating part of TMS and GST's response to this complaint, plaintiff alleged the following in its complaint:

> 62. The Plaintiff requests damages for all acts committed or damage caused within the applicable four-year statute of limitations plus any additional relevant periods for which limitations would be tolled pursuant to 15 U.S.C. § 16(i), or pursuant to the continuing tort theory or any other equitable tolling theory applicable under federal law.
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> 63. . . .
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> 64. The doctrine of res judicata clearly does not bar this action under relevant law because the causes of action brought herein involve exclusive federal court jurisdiction and therefore could not have been litigated in state court . . .

See Complaint at 23-24. [Emphasis in original].

The pending motion seeks summary judgment on the following grounds: (1) the antitrust claims and the ADDICA claim are barred by limitations, (2) the ADDICA claim is barred by res judicata and the failure to state a cause of action, and (3) the restraint of trade and monopolization claims do not state a claim for relief.

TYING ARRANGEMENTS. Plaintiff first alleges that since 1986, tying arrangements have existed. Generally, a tying arrangement is the sale of one item on the condition that the buyer purchase a second item from the same source. See Marts v. Xerox, Inc., 77 F.3d 1109 (8th Cir. 1996). Such arrangements can constitute an unreasonable restraint of trade and violate the Sherman Act. See Systemcare, Inc. v. Wang Laboratories Corp., 117 F.3d 1137 (10th Cir. 1997). Plaintiff offers the following allegations in support of the count:

> 46. Specifically, the Plaintiff . . . [was] . . . required, as a condition of buying automobiles from Toyota, to purchase certain port installed "add-ons" against [its] will through force and coercion, such add-ons as "consumer protection packages" and "undercoating," etc., all of which could be installed by the dealer at much lower cost by commerce with other competitors in the relevant [market] . . .

See Complaint at 19-20.

Federal antitrust causes of action are governed by a four year period of limitations. See 15 U.S.C. 15b. The period commences on the date the cause of action accrues, that being, the date on which the wrongdoer commits an act that injures the business of another. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971). There are at least three exceptions, however, that permit a complaint to be filed more than four years after the events that give rise to the cause of action. The first exception involves a continuing

conspiracy or continuing violation; it permits a cause of action to accrue whenever the wrongdoer commits an overt act in furtherance of an antitrust conspiracy or, in the absence thereof, commits an act that by its very nature is a continuing antitrust violation. See Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1983). The overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on plaintiff. See Pace Industries, Inc. v. Three Phoenix Co., 813 F.2d 234 (9th Cir. 1987).

The second exception involves situations when the wrongdoer's antitrust act is "'revived." See Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d at 1051 [quoting Zenith Radio Corp. v Hazeltine Research, Inc., 401 U.S. at 339-40]. The cause of action is "'revived' outside the limitations period, as a basis for damages, because when the act originally occurred, [the innocent party's] damages were speculative or unprovable." See Id.

A third exception is codified at 15 U.S.C. 16(i). It excludes from the four year statute of limitations the time during which the wrongdoer is the subject of a civil or criminal proceeding by the United States.[3]

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[3] 15 U.S.C. 16(i) provides, in part, that "[w]henever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . ., the running of the statute of limitations in respect of every

The alleged tying arrangements in this case began by at least 1986. See Complaint at 19. The Arkansas Supreme Court found that plaintiff knew of, or could have discovered, the arrangements by as early as 1987. See Chalmers v. Toyota Motor Sales, USA, Inc., 935 S.W.2d at 263. By its own admission, plaintiff knew of the alleged arrangements by late 1989. See Id. at 260. Plaintiff filed this complaint on April 23, 1997, and, therefore, any antitrust cause of action accruing prior to April 23, 1993, is barred by limitations. The question for the Court is whether the alleged arrangements that occurred after April 23, 1993, can now be litigated.

The first exception, the continuing conspiracy or continuing violation exception, requires the Court to first determine whether a conspiracy existed between the defendants. Notwithstanding the arguments of plaintiff, the Court is firmly convinced that TMS did not sell vehicles to plaintiff, that TMS did not control GST, and that a conspiracy did not exist between them. For these reasons, the count should be, and is, dismissed. Accepting for purposes of this Memorandum Opinion and Order that a conspiracy existed between TMS and GST, did they commit an overt act, as that term is defined in Pace Industries, Inc. v. Three Phoenix Co., between April 23, 1993, and April 23, 1997, in furtherance of the conspiracy?

The complaint contains an allegation of an overt act occurring within the period of limitations, that is, the

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private or State right of action . . . shall be suspended during the pendency thereof and for one year thereafter: . . ."

continued existence of the tying arrangements. The problem with plaintiff's assertion, though, is that the tying arrangements that occurred after April of 1993 were not new and independent acts. They were instead the same acts, or the reaffirmation of the prior acts, that plaintiff knew of, or could have discovered, as early of 1987. Alternatively, as plaintiff admitted in its state court complaint, it perceived the effects of the conspiracy and pricing disparity by late 1989. It cannot complaint about being barred from litigating the legality of the arrangements when it was aware of the arrangements years before April of 1993. The defendants did not commit an overt act during the four year period from April of 1993 until April of 1997. This exception is of no use.

With respect to the second exception, i.e., the damages were speculative until now, the Court is not persuaded that the damages only now became certain. Nothing has changed since the inception of the alleged tying arrangements, and the Court is convinced that plaintiff could have shown its damages with certainty, i.e., from the inception of the arrangements, plaintiff could have shown "the difference between the price it actually paid for the tied product and the price at which the [tied] product could have been obtained on the open market." See Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 at 1054 (articulating the ordinary measure of damage in tying arrangements). This exception is also of no assistance to plaintiff.

With respect to the third exception, found at 15 U.S.C. 16(i), plaintiff did not make specific reference to, and the Court is not aware of, the commencement of a civil or criminal proceeding by the United States against the

defendants. Plaintiff has failed to come forward with any evidence that the defendants have been the subject of a federal investigation, and the Court has no idea whether such an investigation is a "civil or criminal proceeding" envisioned by 15 U.S.C. 16(i). For these reasons, the Court is convinced that this exception is of no assistance to plaintiff.

On the basis of the foregoing, the Court finds that count one of the complaint--the tying arrangements claim--is without merit or is otherwise barred by the four year limitations period. It will not be considered further.

DISCRIMINATION. In count two, plaintiff alleges that since at least 1986, the defendants "engaged in an unlawful combination and conspiracy in restraint of . . . trade . . . by conspiring to create and enforce illegal price discrimination as well as other discrimination" See Complaint at 20. [Emphasis in original]. 15 U.S.C. 13(a) prohibits certain forms of pricing discrimination.[4] Plaintiff offers the following allegations in support of the count:

> 50. Specifically, Toyota conspired to discriminate between the Plaintiff and the other

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[4] 15 U.S.C. 13(a) provides, in part, that "[i]t shall be unlawful for any person engaged in commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowing receives the benefit of such discrimination, or with customers of either of them: . . ."

dealers in the relevant market to force the Plaintiff to pay more for goods of like grade and quality than other dealers by:

> (1) Requiring that Plaintiff pay a higher base price for the same models;
>
> (2) Requiring that Plaintiff pay a higher price for the same options thereon;
>
> (3) Requiring that Plaintiff purchase higher priced loaded-down vehicles not required of the other dealers through discriminatory allocations;
>
> (4) By committing other acts of discrimination in advertising promotions, committing acts of tying arrangements but not upon other dealers, and by excluding Plaintiff [from] and refusing to deal with Plaintiff in the Cincinnati Zone Association;
>
> (5) And by committing these acts to injure secondary and tertiary line competition.

51. All of the wrongful conduct alleged caused injury to competition, involved both horizontal and vertical restrains of trade, occurred within the relevant market, and

> severely damaged the Plaintiff, and competition with Toyota USA in the relevant market has been eliminated as has competition in post-manufacture installed "add-ons."

See Complaint at 20-21. The defendants would also have the Court dismiss this count because it is barred by limitations.

Like the tying arrangement claim alleged in count one, a price discrimination claim is governed by the same four year limitations period. See 15 U.S.C. 15b. The discriminatory pricing alleged in this case commenced by at least 1986. See Complaint at 20. The Arkansas Supreme Court found that plaintiff knew of, or could have discovered, the discrimination by as early as 1987. See Chalmers v. Toyota Motor Sales, USA, Inc., 935 S.W.2d at 263. By its own admission, plaintiff knew of the alleged arrangements by late 1989. See Id. at 260. Plaintiff filed this complaint on April 23, 1997, and any antitrust cause of action accruing prior to April 23, 1993, is barred by limitations. The question is again whether the Court can consider the acts of price discrimination that occurred after April of 1993.

As a preliminary matter, the Court again notes that there is no evidence that TMS sold vehicles to plaintiff, that TMS somehow controlled GST, or that a conspiracy existed between TMS and GST. For these reasons alone, this count should be, and is, dismissed.

Accepting that a conspiracy existed, did the defendants commit an overt act, as that term is defined in Pace Industries, Inc. v. Three Phoenix Co., between April 23, 1993, and April 23, 1997, in furtherance of that conspiracy?

The Court thinks not. The price discrimination that occurred within the four year period was not a new and independent act. The discrimination was instead the same act, or the reaffirmation of the previous act, that plaintiff was aware of years before April of 1993. The Court thus finds that TMS and GST did not commit an overt act within the four year period.

With respect to the other exceptions to the limitations bar, i.e., plaintiff's damages were uncertain and the United States had commenced a civil or criminal proceeding against the defendants, the undisputed facts conclusively establish that those exceptions are not applicable. The Court finds that count two--the price discrimination claim--is without merit or is otherwise barred by limitations. It will not be considered further.

RESTRAINT OF TRADE. In count three, plaintiff alleges that since at least 1986, the defendants have "conspir[ed] to create and enforce restraints of trade. "See Complaint at 21. [Emphasis in original]. Some restraints of trade are not reasonable and, as a result, run afoul of 15 U.S.C. 1, either because the restraints fit within a class which are "per se" unreasonable or because the restraints violate what the parties and the case law refer to as the "Rule of Reason." See Flegel v. Christian Hospital, Northeast-Northwest, 4 F.3d 682 (8th Cir. 1993). See also FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).[5] Both

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[5] 15 U.S.C. 1 provides, in part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with

the "per se" analysis and the "Rule of Reason" require proof that there was an agreement, conspiracy, or combination of two or more entities. See American Ad Management, Inc. v. GET Corp., 92 F.3d 781 (9th Cir. 1996). Plaintiff offers the following allegations in support of this count:

> 54. The allegations contained in the complaint constitute an illegal conspiracy between horizontal competitors to allocate customers, territorial market share, to boycott, to exclusively deal, to refuse to deal, all to knowingly damage competition in the relevant market generally and to injure Plaintiff specifically by disallowing Plaintiff to buy "add-ons"elsewhere, and by committing the other acts alleged in order that [GST], as a horizontal competitor, would cede its portion of the relevant market to [TMS] and whereby [TMS] would prevent Plaintiff from competing in said market.

See Complaint at 22.

The restraints of trade allegedly commenced by at least 1986. See Complaint at 21. Plaintiff knew of, or could have discovered, the restraints by 1987, see Chalmers v. Toyota Motor Sales, USA, Inc., 935 S.W.2d at 263, and admits to doing so by late 1989, see Id. at 260. Plaintiff filed this complaint on April 23, 1997, and any antitrust cause of action accruing prior to April 23, 1993, is barred by limitations.

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foreign nations, is hereby declared to be illegal."

See 15 U.S.C. 15b. Can the Court consider the alleged restraints that occurred after April of 1993?

As a preliminary matter, plaintiff makes a mighty attempt to demonstrate the existence of a combination or conspiracy between TMS and GST. The Court finds, however, that there is no credible evidence that they entered into a combination or conspiracy, to drive plaintiff from the market or to otherwise restrain trade or commerce. Because there is no credible evidence, the Court finds count three to be without merit.

Accepting for purposes of this Memorandum Opinion and Order that a conspiracy existed between the defendants, did they commit an overt act, as that term is defined in Pace Industries, Inc. v. Three Phoenix Co., between April 23, 1993, and April 23, 1997, in furtherance of that conspiracy? The Court thinks not. The acts allegedly evidencing a restraint of trade that occurred within the period were not new and independent acts. They were instead the same acts, or the reaffirmation of the prior acts, that plaintiff was aware of before April of 1993. Thus, the Court finds that TMS and GST did not commit an overt act within the four year period of limitations.

With respect to the other exceptions to the limitations bar, i.e., plaintiff's damages were uncertain and the United States had commenced a civil or criminal proceeding against the defendants, the undisputed facts conclusively, establish that those exceptions are inapplicable. The Court finds that count three--the restraint of trade allegation--is without merit or is otherwise barred by limitations. It will not be considered further.

MONOPOLIZATION. In count four, plaintiff alleges that since at least 1986, TMS and GST have "conspir[ed] to create and enforce monopolization." See Complaint at 22. [Emphasis in original]. 15 U.S.C. 2 prohibits a conspiracy to monopolize and a conspiracy that attempts to monopolize, trade or commerce.[6] Plaintiff offers the following allegations in support of this count:

> 57. Toyota and specifically the Defendants have conspired to allow, through horizontal conspiracy, Gulf States and Toyota USA to allocate and monopolize intra-brand competition in the relevant market and to monopolize the relevant market for post-manufacture installed "add-ons" through a vertical conspiracy. Competition has been foreclosed and thereby injured.

See Complaint at 22.

The conspiracy to monopolize allegedly began by at least 1986. See Complaint at 22. Plaintiff knew of, or could have discovered, the conspiracy by 1987, see Chalmers v. Toyota Motor Sales, USA. Inc., 935 S.W.2d at 263, and admits to doing so by late 1989, see Id. at 260. Plaintiff filed this complaint on April 23, 1997, and any antitrust cause of

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[6] 15 U.S.C. 2 provides, in part, that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony, . . .

action accruing prior to April 23, 1993, is barred by limitations. See 15 U.S.C. 15b (four year statute). Can the Court consider the acts tending to establish a conspiracy that occurred after April of 1993?

As a preliminary matter, the Court again notes that there is no evidence that TMS sold vehicles to plaintiff, that TMS somehow controlled GST, or that a conspiracy existed between TMS and GST. For these reasons alone, this count should be, and is, dismissed.

Accepting for purposes of this Memorandum Opinion and Order that a conspiracy existed between the defendants, did they commit an overt act, as that term is defined in Pace Industries, Inc. v. Three Phoenix Co., between April 23, 1993, and April 23, 1997, in furtherance of that conspiracy? The Court thinks not. The acts allegedly showing a conspiracy to monopolize that occurred within the period were not new and independent acts. They were instead the same acts, or the reaffirmation of prior acts, that plaintiff was clearly aware of well before 1993. The Court finds that the defendants did not commit an overt act within the four year statute of limitations.

With respect to the remaining exceptions to the four year statute of limitations, i.e., plaintiff's damages were uncertain and the United States had commenced a civil or criminal proceeding against TMS and GST, the undisputed facts conclusively establish that those exceptions are not applicable in this instance. The Court therefore finds that count four the claim that TMS and GST conspired to monopolize or attempted to monopolize--is without merit or

is otherwise barred by limitations. For that reason, it will not be considered further.

ADDICA. In count five, plaintiff alleges a violation of the ADDICA. See 15 U.S.C. 1222.[7] Plaintiff specifically alleges the following in connection with this count:

> 59. The Defendants violated the Automobile Dealers Day in Court Act by failing to act in good faith in complying with the terms of the [p]laintiff's franchise and constructively terminating the [p]laintiff. The other allegations contained in the complaint demonstrate the malicious anti-trust violations committed by the [d]efendants against the [p]laintiff, and the [p]laintiff would submit coercion, and intimidation as defined in 15 U.S.C. 1221(e) such that said anti-trust violations, intentionally committed to the point of bankrupting the [p]laintiff, constitute violations of the Dealers' Day in Court Act in the context of the allegations of this case to the point of the financial destruction and

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[7] 15 U.S.C. 1222 provides, in part, that "[a]n automobile dealer may bring suit against any automobile manufacturer engaged in commerce . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or terminating, canceling, or not renewing the franchise with said dealer: . . ."

> constructive termination of [p]laintiff's franchise with Toyota.

See Complaint at 23.

TMS and GST would have the Court dismiss count five on grounds of res judicata, limitations, and the failure of plaintiff to state a claim. With respect to res judicata, the Court agrees with TMS and GST that the claim could have been litigated in the state court proceeding because plaintiff clearly knew of the facts at the time he commenced that proceeding and because there is no authority for the proposition that the federal forum is the exclusive forum for litigating ADDICA claims. Plaintiff maintains, though, that it can litigate the violations of the ADDICA that occurred after April of 1993.[8] The problem with plaintiff's assertion is that, like the other counts, the acts that allegedly occurred after April of 1993 were not new and independent acts but simply the same acts, or the reaffirmation of the previous acts, that occurred before April of 1993. For this reason, the Court finds that plaintiff cannot now litigate the alleged violations of the ADDICA that occurred after April of 1993.

The Court finds that count five--the ADDICA claim--is barred by res judicata and the applicable limitations period. The Court will not consider the count further.

---

[8] The ADDICA is governed by a three year limitations period. See 15 U.S.C. 1223. A claim brought pursuant to the ADDICA accrues when the litigant discovers or, in the exercise of due diligence, should have discovered the acts giving rise to the claim. See Sink v. Ford Motor Co., 549 F.Supp. 245 (E.D.Mich. 1982).

CONCLUSION. After a complete review of all the pleadings and exhibits, the Court finds that the material facts are undisputed. TMS and GST are entitled to judgment as a matter of law, and their motions for summary judgment are granted. Judgment will be entered for the defendants.

IT IS SO ORDERED this 21st day of January, 1998.

/s/_____
HENRY WOODS, U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed: September 2, 1999]

No. 98-3243

Appeal From The United States District Court
For The Eastern District Of Arkansas

HUGH CHALMERS MOTORS, INC.
Plaintiff-Appellant,

v.

TOYOTA MOTOR SALES U.S.A., INC.;
GULF STATES TOYOTA, INC.
Defendants-Appellees.

ORDER

The Petition for Rehearing is denied. The Petition for Rehearing En Banc is also denied. Judge Richard S. Arnold took no part in the decision of this case.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

No. LR-C-97-331

[Filed: February 2, 1998]

HUGH CHALMERS MOTORS, INC.
Plaintiff,

v.

TOYOTA MOTOR SALES U.S.A., INC.; and GULF STATES TOYOTA, INC.
Defendants.

EXCERPTS FROM CHALMERS MOTION AND BRIEF

* * * * *

. . . It is simply premature to judge the credibility of these disputed facts by summary judgment, and the Plaintiff under established law is entitled to the presumption that its version of disputed facts is true when assessed against a Motion for Summary Judgment.

ii. Even had there been no evidence of a conspiracy presented, and as is clearly established in the accompanying Memorandum of Authority, the relationship between the Defendant and the Plaintiff itself constitutes a combination of two distinct parties which automatically meets the requirements of the Sherman Act. In tying arrangement cases, the Courts have consistently held that the relationship between the wrongdoing seller (GST here) and the coerced buyer (Chalmers here) in effect constitutes a "combination" as required by the Sherman Act. As such, the conspiracy requirement is rarely ever an issue in tying arrangement cases and could not be grounds for dismissal.

* * * * *

Legal Authority

II. Plaintiff's Relationship with Each Defendant Constitutes a "Combination" under 15 USC 1 and Perma Life Mufflers v. International Parts Corp. (Midas) 392 U.S. 134 (1968).

There can be no question that the conspiracy/ combination or plurality requirement has been met in this case under the indistinguishable authority of Perma Life v. Int. Parts Corp., 392 U.S. 134 (1968). Perma Life Mufflers, Inc. and other distributors of Midas Corp. and its parent corporation, International Parts Corp., sued Midas alleging that Midas had violated the anti-trust laws by illegal price discrimination and by illegally tying the sale of mufflers (the desired product) to the sale of unwanted other products and

accessories (the tied products) which Midas sold at inflated prices. The District Court dismissed the case because no conspiracy existed between the Defendants due to their identity as alter egoes. Id. The District Court further denied the Plaintiff's attempts to have the issues reconsidered on the ground each Plaintiff was in effect a party to a combination, because the Court ruled a claim by a co-conspirator to a violation against itself was barred by the doctrine of in pari delicto (the legal equivalent of the equitable unclean hands doctrine). See Id.[]. Defendant Midas had also argued that since the complaint alleged a conspiracy between the Defendants, and did not specifically state the Plaintiffs themselves were also parties to the combination or conspiracy, that the Plaintiffs should not be allowed to use this theory, even though the facts of the tying arrangements had been laid out in great detail in the complaint. Id. at 141-142.

Justice Hugo Black, writing for a Court which was 9-0 concurring in the result, stated:

> Petitioners' complaint challenged, as illegal restraints, . . . terms barring them from purchasing from other sources of supply, (and) tying the sale of mufflers to the sale of other products . . . Petitioners alleged that they had often requested Midas to eliminate these restrictions but that Midas had refused and had threatened (the dealers) if they failed to comply". Id. at 137.

Clearly, the Perma-Life case is indistinguishable from the case at bar. Justice Black concluded that, under such circumstances:

> "(Each Plaintiff) can clearly charge a combination between Midas and himself . . . and thereby satisfy the plurality requirement." Id. at 142.

The court also ruled the in pari delicto defense inapplicable and overruled the District Court's finding that a corporation cannot conspire with its subsidiary (alter ego), Id. at 138, 141-142.

Finally, Justice Black confirmed the Plaintiff's right to allege alternative theories of conspiracy:

> Although (Midas) objects that these particular theories of conspiracy now pressed by plaintiffs were not alleged with sufficient specificity in their complaint, this suggestion is completely without merit. (emphasis added). Our modern rules provide for trying cases to serve the ends of justice and require that pleadings be so construed as 'to do substantial justice'. Rule 8(f), Fed. Rules Civ. Proc. The gist of petitioners cause of action has been clear from the outset, and respondent will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy. Id. at 142.

Therefore, the facts pled in Plaintiff Chalmers' complaint, included but not limited to paragraphs 45-46, satisfy the conspiracy requirement. This is regardless of the strong evidence of control by Defendant TMS, and the direct combination between Defendants TMS and GST, evidence which should not be disregarded on a summary judgment motion.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

No. LR-C-97-331

[Filed: February 2, 1998]

HUGH CHALMERS MOTORS, INC.
Plaintiff,

v.

TOYOTA MOTOR SALES U.S.A., INC.; and GULF STATES TOYOTA, INC.
Defendants.

AFFIDAVIT OF PETER NIKOLIKAKIS

* * * * *

C. Subsequent Overt Acts. With each allocation, new methods to deceive the dealers as to which "option" packages would be available are discussed and implemented. Ordering "options" by template, so that the District Sales managers, not the dealers, ordered full vehicle options loading with one computer key was one new method; tying some desired options with others in a mandatory package was another. . . . Such different, reconfigured or new practices

occurred with regard to every allocation between "April of 1993 until April of 1997", and there were many others.

D. Other Overt Acts. When, in regard to one allocation, any dealer sought to change "options" loading by refusing to accept cars, the vehicles themselves might be withheld, or the dealer might then receive undesirable makes or colors of vehicles, but it would then be in regard to the next allocation when the overt acts would be implemented to coerce the dealer's future compliance. Market Action Funds would be withheld, or late deliveries would be made to impede the dealer's ability to sell within the allocation period, which, in turn, would determine how many vehicles the dealer could "earn" under the distribution method which is subsequently described.

E. Participation by TMS and Secrecy. The commissions and incentives pay program for the District Sales Managers was a matter of great secrecy among the management of Defendant CST, though it was known by Defendant TMS, as Defendant TMS participated in the operations and accessories program and audited its operation, and this pay program was periodically revised during the period "April of 1993 until April of 1997". . . .

* * * * *

5. Targeting the Chalmers Dealership. At the inception of my employment with GST, I was directed by the management of GST, specifically by Tom Bittenbender, Vice President of Sales, and subsequently by the expressed adoption by John Bishop, Group Vice President of Sales and Marketing, and Jerry Pyle, President of GST, to treat the

Chalmers family, owners of the Toyota Dealership in West Memphis, differently than any other dealer in my territory. I was given the prior Dealer Contract Reports put together by my predecessor, Steven A. Woods, to use as a guide for the accumulation of only negative information with regard to the Chalmers Dealership. I was directed as to the company's position with regard to the claims of the Chalmers Dealership and, at the time, had no reason to believe otherwise. Chalmers was described as "the enemy", and I was told to prepare every Dealer Contact Report for that dealership in a negative fashion for use in court.

* * * * *

6. The Discovery of Corruption. Although, as I have already asserted in this affidavit and will explain in detail when the opportunity is given, the upper management of GST has lied under oath about this subject, there is most assuredly an options and accessories "program" which has existed at GST for many years, and no matter what any member of management might say, it is a fixed and carefully monitored program, always expanding, and it is the main focus of the District Sales Managers' responsibilities. Internally, the management of Defendant GST describe the PIO (now called "LIO") program as "huge" and the main source of income for the entire corporation. Further, the options and accessories program is combined with the allocation and distribution systems, through which Toyota vehicles are distributed throughout the GST region, which make up the enterprise which comprises GST. Soon after my employment with GST commenced, I was informed by dealers in my district, including but not limited to Lindell Trimble, the . . .

Affidavit of Peter Nikolikakis (Excerpted)

* * * * *

C. GST District Sales Managers are required, in order to keep their employment, to engage in every act of duress, coercion or fraud required in order to force the dealers in their districts to accept vehicles as loaded with add-ons in accordance with the penetration levels demanded by GST, and, in order to do so, the District Sales Managers, directly supported and encouraged by GST management (which also derives substantial income from the LIO commission structure), will and do overtly and with regard to every allocation between April 1993 and April 1997, withhold earned allocation, provide undesirable vehicles, refuse to provide vehicles without unwanted add-ons, make late deliveries of vehicles, withhold discretionary market assistance funds, and withhold reserve vehicles, or threaten to do any of the preceding so that the consumers are left with vehicles with inflated pricing solely attributable to the unwanted add-ons. . . .

* * * * *

> Keep the heat on hourly. There is a bunch of money for everyone in the food chain and we need all of the greed we have to take hold . . .

D. District Sales Managers are instructed in group meetings with John Bishop, Group Vice President of Sales and Marketing, as to the a[n]tics described, and they are further instructed to maintain secrecy as to all dealers, and as to everyone else, with regard to the LIO program, and District Sales Managers are also instructed that GST maintains a war chest to be used to influence and to suppress any and all

litigation through which anyone might challenge the racket described in this affidavit as conducted by the enterprise known as GST, all within the knowledge and through the consent of TMS.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

No. LR-C-97-331

[Filed: February 2, 1998]

HUGH CHALMERS MOTORS, INC.
Plaintiff,

v.

TOYOTA MOTOR SALES U.S.A., INC.; and GULF STATES TOYOTA, INC.
Defendants.

SUPPLEMENTAL AFFIDAVIT OF HUGH B. CHALMERS

Affiant states upon oath:

1. Attached hereto are documents received by me from a congressional subcommittee in Washington D.C. and about which the court could take judicial notice. Effort has been made to secure evidence of where this investigation proceeded after Congressional inquiry; however, records of active investigations are not available, and any review would require weeks of work and great expense, including travel, hotel, etc. Furthermore, Toyota has obtained protective order in

litigation believed to be related to keep the existence of each case secret as much as possible. See attached documents in Case No. CV-89-577, which are "sealed" and "confidential" and therefore unavailable to the public.

3. With regard to the tying add-on scheme of Toyota (TMS) and Gulf States (GST), as the attached invoice reflects, GST was not the only defendant to force unwanted tied products on vehicle deliveries. While it is true that sealant, pin stripes, undercoating and the like were added by GST, some tied products were sold and tied by TMS through the GST system, such as radio accessories, extra tires, etc. See highlighted portions of attached memos as just one example.

4. Also, whenever I complained to GST about the disproportionate effect of their tying arrangement, specifically on me and the Plaintiff, Jerry Pyle, President of GST, told me he was unable to help me because TMS was in charge and that I was being treated according to the dictates of TMS. . . .

5. After the state court case was filed, I was told that I could not be both a dealer and a plaintiff and that I had to make a choice. When we continued with the state court action, the Defendants changed for the worse the way they had treated me and the company, specifically:

a. New "add-ons" were forced on us in order to receive our allocations, the prices of the add-ons were increased and desirable premium vehicles like the Land Cruiser were no longer delivered.

b. Instead undesirable vehicles were sent which damaged our income;

c. Financing was cut off by the Defendants;

d. Assistance programs available to other dealers were cut off;

e. Other standard programs were cut off by the Defendants. All of these new activities above happened for the first time within the last four years, although they were all a part of the continuing tying and discrimination scheme which began in the late 1980's. However, this was the first time I was told that our company was being singled out for individualized injury in retaliation for the lawsuit.

* * * * *

THIS AFFIDAVIT is given under oath on this 2nd day of February, 1998, through execution in the space provided below.

/s/_____
HUGH B. CHALMERS

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

No. LR-C-97-331

[Filed: April 23, 1997]

HUGH CHALMERS MOTORS, INC.
Plaintiff,

v.

TOYOTA MOTOR SALES U.S.A., INC.; and GULF STATES TOYOTA, INC.
Defendants.

COMPLAINT

The Plaintiff, for its cause of action against the Defendants, states as follows:

JURISDICTION

1. This is an action brought pursuant to Section 15 of Title 15 of the United States Code to recover damages for violations of the anti-trust laws of the United States of America, including, Sections 1 & 2 of the Sherman Antitrust

Act (15 U.S.C. §§ 1 & 2), and 77 of the Wilson Tariff Act (15 U.S.C. § 8 & § 15), Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. §§ 13 (a) - (f)), and Section 3 & 4 of the Clayton Act (15 U.S.C. §§ 14-15). This court has exclusive subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1337. This is also an action brought pursuant to the Automobile Dealers Day in Court Act (15 U.S.C. §§ 1222).

PARTIES

2. The Plaintiff is an Arkansas Corporation domiciled in West Memphis, Arkansas and doing business in the Eastern District of Arkansas. The Plaintiff is an automobile dealer which was a franchisee of the Defendants until constructively terminated in March 1996 by the Defendants, acting in concert, in violation of law.

3. Toyota Motor Company of Japan, a non-defendant co-conspirator (hereinafter "Toyota Japan") is a multi-national conglomerate corporation headquartered in Tokyo, Japan and doing substantial import business world-wide and in the Eastern District of Arkansas.

4. Defendant, Toyota Motor Sales USA, Inc. (Toyota USA) is a Delaware Corporation doing substantial import business in the United States and in the Eastern District of Arkansas, and is a wholly owned subsidiary of Japan.

5. Gulf-States Toyota, Inc. ("Gulf States") is a Texas Corporation headquartered in Houston, Texas doing

substantial import business in the Southern United States and in the Eastern District of Arkansas.

6. The Court has personal jurisdiction over the parties to this action because all are doing business in this district and state involving literally billions of dollars in sales and profits through commerce and trade in automobiles manufactured by Toyota Japan, and distributed by Toyota USA and Gulf States. All Defendants and Toyota Japan are collectively referred to as "Toyota."

VENUE

7. Venue lies herein, and the Defendants may be served with process through their registered agents, in this District, where they conduct commercial activity, pursuant to 15 U.S.C. § 22.

* * * * *

E. The options-loading practices and the restrictive allocations practices of Defendants became the continuing practices of the Defendants' anti-trust conspiracy. The concerted activities of this continuous conspiracy continued and culminated in the anti-trust injury actually sustained by the Plaintiffs when they were forced to sell their Toyota dealership at liquidation value in March, 1996, and not at the fair market value such dealership would have had in the absence of the continuing anti-trust conspiracy;

* * * * *

(3) employing coercive methods, threats, and extortion to require dealer acceptance of "options" and accessories not ordered, not wanted by dealers or consumers, but generating Fifty Million Dollars ($50,000,000.00) profit annually for Defendant Gulf States in exchange for concession of the relevant market to Defendant Toyota USA, through its Cincinnati Region all for the specific purpose of eliminating horizontal competition between the Defendants in the relevant market;

* * * * *

(5) threatening potential witnesses and using illegal measures to prevent discovery of the truth in the Plaintiff's investigation of their claims in state court and otherwise;

* * * * *

COUNT ONE - TYING ARRANGEMENTS

44. The Plaintiff incorporates all other paragraphs of this complaint into this count one.

45. At least since 1986 and continuing to date, the Defendants have been engaged in an unlawful combination and conspiracy in restraint of the herein above described interstate trade and commerce in violation of the statutes cited in paragraph two (2) above, by conspiring to create and enforce illegal tying arrangements.

46. Specifically, the Plaintiff, and other dealer/franchises of the Defendants were required, as a condition of buying automobiles from Toyota, to purchase

certain port installed "add-ons" against their will through force and coercion, such add-ons as "consumer protection packages" and "undercoating," etc., all of which could be installed by the dealer at much lower cost by commerce with other competitors in the relevant marke[t] for such "add-ons," which competition was prohibited by Defendants.

47. Despite numerous complaints and objections to the forced purchase of unwanted add-ons, the Defendants continued this illegal practice and the commission of the other violations outlined in this complaint.

* * * * *

COUNT FIVE - FRANCHISE VIOLATIONS

58. The Plaintiff incorporates all other paragraphs of this complaint into this count five.

59. The Defendants violated the Automobile Dealers Day in Court Act by failing to act in good faith in complying with the terms of the Plaintiff's franchise and constructively terminating the Plaintiff. The other allegations contained in the complaint demonstrate the malicious anti-trust violations committed by the Defendants against the Plaintiff, and the Plaintiff would submit that the anti-trust violations described are per se bad faith, coercion, and intimidation as defined in 15 U.S.C. § 1221(e) such that said anti-trust violations, intentionally committed to the point of bankrupting the Plaintiff, constitute violations of the Dealers' Day in Court Act in the context of the allegations of this case to the point of the financial destruction and constructive termination of Plaintiff's franchise with Toyota.

DAMAGES

60. The Plaintiff has sustained damages in an amount in excess of Five Million Dollars ($5,000,000.00).

RELIEF REQUESTED

61. The Plaintiff requests all monetary damages allowed by the law, treble pursuant to Section 4 of the Clayton Act, along with pre-judgment and post-judgment interest, attorneys' fees, and costs, and other appropriate relief.

62. The Plaintiff requests damages for all acts committed or damage caused within the applicable four-year statute of limitations plus any additional relevant periods for which limitations would be tolled pursuant to 15 U.S.C. 16(i), or pursuant to the continuing tort theory or any other equitable tolling theory applicable under federal law.

63. A jury trial is requested.

64. The doctrine of res judicata clearly does not bar this action under relevant case law because the causes of action brought herein involve exclusive federal court jurisdiction and therefore could not have been litigated in state court as the Arkansas Supreme Court, in effect, ruled in preclusion of the issue being raised now by Defendants when it held at pages 13-15 of its opinion that interstate antitrust is not cognizable under state law. This ruling, by implication, requires the Plaintiff to bring these causes of action in this Court and could not, therefore, be construed to constitute any bar, as no adjudication on the merits has been made.

65. Plaintiff reserves the right to amend this complaint as necessary.

The Plaintiff thereby respectfully requests that this complaint be granted in all respects.

Respectfully submitted,

/s/_____
Greg Stephens
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APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed: August 5, 1999]

No. 98-3243

Appeal From The United States District Court
For The Eastern District Of Arkansas

HUGH CHALMERS MOTORS, INC.
Appellant,

v.

TOYOTA MOTOR SALES U.S.A., INC.;
GULF STATES TOYOTA, INC.
Appellees.

EXCERPTS FROM CHALMERS' CLOSING BRIEF

* * *

G. Before dismissing a complaint for failure to state claim, the Court should allow the complaint to be amended rather than dismissed unless the amendment would be futile.

* * *

19. The Panel should have invited Chalmers to amend. Had the District Court ruled that the facts were sufficiently alleged, but the wrong theory cited, Chalmers would have immediately amended the complain to state the theory the Court ruled to be valid. Chalmers reserved the right to amend "as necessary" at ¶65 of the Complaint. (Appendix 24). The District Court, however, refused to follow Perma-Life, requiring instead a conspiracy between the defendants, such that an amendment to state a theory of individual liability would have been futile because the District Court did not recognize the applicability of the Perma-Life rule. Only now, when the claim against GST individually has finally been recognized as valid has the possibility of amendment been worthwhile.

20. Once the District Court's rulings on statutes of limitations and the possibility of sole defendant liability had been reversed by the Panel, precedent required that Chalmers be invited to amend rather than be dismissed. As this Court has held:

> "No matter how impossible it may be that the plaintiff can establish the allegations of its complaint, it is, nevertheless entitled to make this attempt."
>
> According it is generally error to dismiss ". . .the complaint without leave to the appellant to amend." Louisiana Farmers Pacific T... Co., 131 F.2d 419, 423-424 (8th Cir. 1942). See also, White v. Bond, 720

F.2d 1002, 1003 (8th Cir. 1983). Amendment should be allowed unless it would be futile. Manz v. Parr, 758 F.2d 1254, 1258-59 (8th Cir. 1985).

21. Finally, the Court should not dismiss the entire case, but rather should invite the appellant to amend, or at least allow appellant to do so, even if no request to amend the pleading was made, unless the amendment would be futile. See Doe v. U.S., 58 F.3d 494 (9th Cir. 1995). Since any amendment before the Panel Decision would have been futile due to the District Court refusal to recognize Perma-Life, such amendment must be allowed now in order to allow Chalmers to seek the relief requested in connection with the arguments made in the briefs pursuant to Perma-Life. As the Court in Polich v. Burlington Northern, 942 F.2d 1467 (9th Cir. 1991) held dismissal without leave to amend is improper. See also, O'Donnel v. Barry, 148 F.3d 1126 (D.C. Cir. 1998).

* * *

Supreme Court, U.S.
FILED
JAN 18 2000
CLERK

No. 99-934

In The

Supreme Court of the United States

HUGH CHALMERS MOTORS, INC.,

Petitioner,

vs.

GULF STATES TOYOTA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

CORPORATE DISCLOSURE STATEMENT

Respondent Gulf States Toyota, Inc. is a private, family-owned corporation. It has no parent company and none of its shares of corporate stock are owned by publically traded companies.

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CONSTITUTIONAL AND STATUTORY ISSUES INVOLVED

Petitioner erroneously suggests that this case involves constitutional issues. Although Petitioner states that the Commerce Clause of the United States Constitution, Article I, § 8, is involved in this case, none of the questions presented by Petitioner or its argument even mention or refer to the Commerce Clause. Neither are there substantial issues raised about the Sherman Act, 15 U.S.C. § 1 or the Automobile Dealers' Day in Court Act, 15 U.S.C. § 1221 *et seq.*, as all issues raised by Petitioner are procedural in nature.

STATEMENT OF THE CASE

The petition for writ of certiorari (the "petition") filed on behalf of Hugh Chalmers Motors, Inc. ("Chalmers") presents a picture vastly different than that presented to the district court and Court of Appeals for the Eighth Circuit. Chalmers now seeks a review of claims against Gulf States Toyota, Inc. ("GST") alone, whereas below Chalmers made no distinction between GST and Toyota Motor Sales, U.S.A., Inc. ("TMS"). Some background is necessary to place this shift of position in proper perspective.

TMS is the importer and distributor of Toyota products in the continental United States. Under TMS's distribution system, the continental United States is divided into twelve multi-state distribution regions. GST is a privately owned and independently managed exclusive

regional distributor of Toyota products for Texas, Oklahoma, Arkansas, Mississippi and Louisiana. The Chalmers dealership, located in West Memphis, Arkansas, and operating pursuant to a dealer agreement with GST, was at the eastern boundary of GST's distribution area. Toyota dealers located across the Mississippi River in Memphis, Tennessee, were supplied vehicles by Toyota Motor Distributors, Inc., a wholly-owned subsidiary of TMS, which is the regional distributor for Tennessee and other surrounding states, known as the "Cincinnati Region."

From the beginning of this controversy – first with the complaint filed in Arkansas state court and later in its federal court complaint – the Chalmers dealership complained about an alleged disparity in pricing to its dealership and to the Toyota dealerships in Memphis which were supplied by the Cincinnati Region. Although the theories and claims varied from time to time, Chalmers consistently alleged that TMS and GST conspired to effect this result. In fact, the complaints filed by Chalmers – both in state court and federal court – consistently referred to both defendants jointly and indistinguishably as "Defendants."

Chalmers' shift in position to assert claims against GST alone has given rise to confusion and distortion of the procedural background and events that occurred below. The petition contains outright misstatements and implications that are contrary to fact. One misleading tactic employed by Chalmers is the attachment to the petition and reliance on appendices that are carefully excerpted to mask their true character and highlight contentions now leveled against GST alone. *See* Excerpts

from Chalmers' Motion and Brief, Appendix E[1] (hereinafter abbreviated "App. ___") at 36a-40a; Affidavit of Peter Nikolakakis, App. F at 41a-45a; Supplemental Affidavit of Hugh B. Chalmers, App. G at 46a-48a; and the Complaint, App. H at 49a-55a. Notwithstanding this approach, the true character of Chalmers' claims asserted below can be gleaned from the Memorandum Opinion and Order of the district court (App. C at 10a-34a) and the Opinion of the Eighth Circuit (App. A at 1a-5a).

In order to correct the many misstatements and false implications contained in the petition, it is necessary to review the procedural history of this case, including the prior Arkansas state court litigation regarding the same activities, the proceedings in district court – particularly the post-judgment activities in which new arguments and theories were raised – as well as the rulings of the Eighth Circuit. Once an accurate description of those events is presented, reasons for denying the writ become readily apparent.

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[1] As an example of the use of an excerpt masking the true character of a pleading, Appendix E is entitled "Excerpts From Chalmers' Motion and Brief." App. E at 36a. The excerpt is taken from two separate pleadings entitled "Motion to Alter Judgment Under Rule 59(e) or to Set Aside Judgment Under Rule 60(b)" and "Memorandum of Authorities in Support of Motion to Alter Judgment Under Rule 59(e) or to Set Aside Judgment Under Rule 60(b)." One might question why the excerpt does not clearly disclose that these were post-judgment pleadings.

A. The Petition Misstates the Background, Claims Asserted and the Disposition of the Prior Arkansas State Court Case.

On August 27, 1993, Hugh Chalmers, Sr., Hugh Chalmers, Jr. and Hugh Chalmers Chevrolet-Cadillac-Toyota, Inc. sued TMS, GST and a GST employee in Arkansas state court alleging breach of contract, breach of an implied covenant of good faith and fair dealing, fraud, interference with contract, and violation of the price discrimination provisions of the Arkansas Unfair Practices Act. *See Chalmers v. Toyota Motor Sales, U.S.A., Inc.*, 326 Ark. 895, 935 S.W. 2d 258, 260 (1996).

The state court defendants removed the case to federal court on the basis that plaintiffs' price discrimination allegations necessarily involved federal question jurisdiction under the Robinson-Patman Act. Plaintiffs moved to remand stating that they had not pleaded, and did not want to plead, a federal cause of action. The district court held that the case should be remanded because plaintiffs had specifically pled state causes of action and had not specifically pleaded a federal claim. In so holding, the district court noted the deficiencies that plaintiffs would likely have in proving their price discrimination claim under the Arkansas Unfair Practices Act because the act applied only to intrastate pricing while plaintiffs' complaint was based on interstate pricing.

On December 28, 1993, the defendants moved for partial judgment on the pleadings as to plaintiffs' cause of action for price discrimination under § 207 of the Arkansas Unfair Practices Act. On September 29, 1994, the state court dismissed plaintiffs' price discrimination

claim because § 4-75-207 applied only to *intra*state price discrimination, whereas plaintiffs alleged *inter*state price discrimination. Plaintiffs then amended their complaint on November 7, 1994, adding claims under the Arkansas Franchise Practices Act. *Id.*, 935 S.W.2d at 260.

Following extensive discovery, defendants moved for summary judgment raising several grounds on each state cause of action, including the statute of limitations. Finding no dispute of material facts, the state court granted summary judgment as to all defendants on that ground. *Id.* The Arkansas Supreme Court affirmed and denied rehearing. *Id.*[2]

B. The Petition Misstates the Proceedings in the District Court.

On April 23, 1997, Chalmers filed suit against TMS and GST in United States District Court for the Eastern District of Arkansas alleging federal antitrust and Automobile Dealers' Day in Court Act ("ADDICA") claims arising out of the operation of the Chalmers Toyota dealership. On July 15, 1997, TMS and GST filed separate motions to dismiss or in the alternative, for summary judgment as to Chalmers' claims. The motions raised several grounds for dismissal of each cause of action, including statute of limitations, *res judicata* and failure to

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[2] Summary judgment was granted and affirmed on statute of limitations grounds as to all claims asserted in the state court action, not just the fraud claim as stated in the petition. *See* Petition at 2.

state an actionable claim. Those motions were fully briefed by the parties.

On October 30, 1997, the district court issued an order indicating that it would treat the pending motions as motions for summary judgment because it would rely on evidence outside the pleadings. In its order, the district court provided the parties ten days to file additional materials in support of or in opposition to the pending motions. Chalmers filed a memorandum containing additional argument. TMS and GST made no additional filing.

On January 21, 1998, the district court filed a Memorandum Opinion and Order granting TMS' and GST's motions for summary judgment, ruling that Chalmers failed to put forward any evidence of its claims of a TMS/GST antitrust conspiracy, that the antitrust claims were barred by the statute of limitations, and finally that the ADDICA claims were time-barred and *res judicata*.

The most egregious misstatement regarding proceedings in the district court is the persistent suggestion and implication that Chalmers raised the distributor-dealer conspiracy theory and argument based on *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (hereinafter *"Perma Life"*), in district court before entry of summary judgment. For instance, the petition alleges that the district court dismissed, finding no conspiracy between defendants, "despite Chalmers' citation to the district court of the case of *Perma-Life*. . . . " Petition at 3. Further, the petition alleges that the district court dismissed the complaint "despite Chalmers' timely proffer of the alternative antitrust theory that allows the relationship between a seller (defendant) and buyer (plaintiff) in

a tying case to satisfy the conspiracy or combination requirements of the antitrust statute pursuant to *Perma-Life*." Petition at 6. Still further, the petition suggests that the theory of a combination between GST and Chalmers was repeatedly stated during "the other pre-trial proceedings established by the rules" by motion, brief and affidavit. Petition at 8. These statements and implications are misleading and false. Chalmers did not raise this argument until *after* the entry of summary judgment against it.

On February 2, 1998, Chalmers filed a motion to alter or to set aside the judgment. Attached as exhibits to the motion were a supplemental affidavit of Hugh B. Chalmers and an affidavit of Peter Nikolakakis.[3] It was in this Rule 59(e) post-judgment motion that Chalmers raised for the first time the argument of distributor (seller)-dealer (buyer) conspiracy and the *Perma Life* case. On July 28, 1998, the district court denied Chalmers' motion holding that the evidence submitted with the motion could not fairly be said to be "new" evidence and that even if the evidence were considered, TMS and GST were still entitled to summary judgment.

It should also be noted that at no time in the district court – either before or after entry of summary judgment

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[3] Peter Nikolakakis, although unnamed, was referred to in the petition as "GST's sales manager [who] testified by affidavit. . . . " Petition at 5. At the time of the post-judgment filing of that affidavit, Nikolakakis had been terminated from his position as a district sales manager and was a disgruntled former employee who subsequently sued GST in Arkansas state court, represented by the same attorney as Chalmers. That suit was subsequently dismissed.

– did Chalmers move for leave to amend its complaint or otherwise suggest to the district court that it desired to amend its complaint.

C. The Petition Misstates and Misconstrues the Rulings of the Court of Appeals.

Notwithstanding Chalmers' representation to this Court that its appeal to the Eighth Circuit pursued individual claims of liability (Petition at 6), the primary thrust of the appeal was a continued assertion of a conspiracy between TMS and GST. Moreover, the petition flatly misstates the ruling of the Eighth Circuit by suggesting that the Court of Appeals overruled the district court's conspiracy ruling and found that Chalmers had alleged facts that would have supported an antitrust claim against GST alone. Petition at 6.

First, the Eighth Circuit actually agreed with the district court that there was insufficient proof of conspiracy:

> Each antitrust count in the complaint alleges an unlawful combination and conspiracy between defendants. However, the record presents no genuine issue of material fact establishing such combination or conspiracy. *See* Memorandum and Opinion, at 11 (finding, in analyzing question of whether continuing conspiracy exception to statute of limitations applied, that no conspiracy existed between TMS and GST). Rather, appellant merely asserted that there is strong evidence that defendants conspired with one another. Such conclusory allegations are insufficient to avoid summary judgment. . . . We thus

> affirm the grant of summary judgment as to the antitrust claims.

Eighth Circuit opinion, App. A at 3a (citations omitted).

Second, Chalmers conveniently and frequently ignores the language contained in footnote 1 of the Eighth Circuit's opinion that the allegations "may have" supported a claim against GST alone, not that they "would have" supported a claim (Petition at 6), or that they "supported an antitrust claim" against GST alone (Petition at 7), or that they "warrant a claim against GST" (Petition at 19). Certainly, there was no holding that an antitrust combination or conspiracy existed as a matter of law, as is suggested by the wording of the initial question presented by the petition. Petition at *i*.

In discussing the Eighth Circuit's affirmance of summary judgment on Chalmers' ADDICA claim, the petition states that the Eighth Circuit "apparently agreed that *res judicata* did not apply . . . ". Petition at 25.[4] This is an incredible statement in light of the Eighth Circuit's plain and unequivocable ruling on this point:

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[4] Although the petition earlier asserts that in order to avoid the *res judicata* defense to the ADDICA claim, the complaint was limited to actions committed by GST after the state lawsuit was filed (Petition at 2), this position is belied by a reading of the complaint itself. Nowhere within the body of Count 5 of the complaint, which alleges the ADDICA claim, is there a limitation of the time period for which damages are sought. Complaint ¶¶58-59. Moreover, the complaint contains an affirmative allegation that the doctrine of *res judicata* does not bar the claims because "the causes of action brought herein involve *exclusive* federal court jurisdiction. . . . " Complaint ¶64.

> As an initial matter, we agree with the district court that the ADDICA claim is barred by the claim-preclusion effect of the earlier state court judgment. Appellant knew of the facts underlying his claim at the time it instituted state court action in 1993, and there is no authority for the proposition that federal district court is the exclusive forum for bringing ADDICA claims. . . .

Eighth Circuit opinion, App. at 4a ((citations omitted).

Chalmers completely ignores the primary ruling of the Eighth Circuit affirming the district court's summary judgment on the ADDICA claim, and instead focuses on what the Eighth Circuit apparently intended to be an alternative ground for supporting the same result. Although Chalmers complains that the Eighth Circuit made no acknowledgment of the substantive case law and authority on ADDICA (Petition at 26), the *res judicata* ruling makes such an analysis unnecessary.[5]

D. The Petition Contains Misstatements That are Not Supported by the Record or Relevant to this Appeal, Apparently in Hopes of Injecting Prejudice and Bias into the Record.

The petition blithely accuses GSST and a separate, privately-owned regional distributor of Toyota vehicles – Southeast Toyota – of implementing programs to require dealers to purchase unwanted port-installed options in

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[5] Contrary to the statement in the petition at 26, there is no stipulation between the parties as to the binding authority under the ADDICA claim.

the mid-1980's and further suggests that Southeast Toyota discontinued that practice as a result of lawsuits while GST has not. Petition at 1. The petition also asserts that there is no factual dispute regarding the existence of the tying arrangements imposed on Chalmers by GST. Petition at 5.

GST strongly disputes the existence of any tying arrangement. However, because summary judgment was sought below on grounds of statute of limitations, absence of a conspiracy, and lack of market power, there was no factual development of GST's position on the alleged tying arrangement – it was simply not an issue that was necessary to the motion for summary judgment. This issue remains strongly disputed.

Insofar as the allegations about the conduct of Southeast Toyota are concerned, those allegations are neither accurate nor supported by the record in this case. More importantly, whatever the conduct of Southeast Toyota may have been, it is totally irrelevant to the issues in this case and the claims Chalmers now attempts to pursue against GST.

REASONS FOR DENYING THE WRIT

A. The Eighth Circuit's Disposition of the Case is Consistent with this Court's Modern Summary Judgment Practice.

The petition suggests that the issue presented in this case is whether alternative theories of recovery in antitrust cases will be allowed by motion, filed after the filing

of the complaint, if a trial on the merits would otherwise be denied. Petition at 5. In addressing this issue, Chalmers suggests that it *timely* proffered an alternative antitrust theory that allows the relationship between seller and buyer in a tying case to satisfy the combination or conspiracy requirement of the antitrust laws pursuant to *Perma Life*. Petition at 6. The fundamental flaw in Chalmers' position is that the *Perma Life* theory of combination or conspiracy was not timely presented.

Although the petition confuses and attempts to obfuscate the timing of various events in the district court, it is indisputable that Chalmers raised the *Perma Life* argument for the first time after the entry of summary judgment against it in a Rule 59(e) motion to alter or to set aside the judgment.[6] It is well settled, however, that new arguments or legal theories cannot be raised for the first time in a Rule 59(e) motion to alter or amend filed after summary judgment has already been granted. *FDIC v. World Univ., Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) ("Rule 59(e) motions are 'aimed at reconsideration, not initial consideration.' Thus, parties should not use them to 'raise arguments, which could, and should, have been

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[6] The sequence of events is reflected by the Appendices to the petition. The district court's memorandum opinion and order granting summary judgment was entered January 21, 1998. App. C at 10a-34a. Chalmers' Rule 59(e) motion and brief presenting the *Perma Life* argument was filed on February 2, 1998 as were the accompanying affidavit of Peter Nikolakakis and supplemental affidavit of Hugh B. Chalmers. *See* App. E at 36a-40a, (note that the excerpts from Chalmers' motion and brief do not disclose that it is a Rule 59(e) motion to alter the judgment), App. F at 41a-45a, and App. G at 46a-48a.

made before the judgment issued.' . . . They may not be used to argue a new legal theory.") (citations omitted); *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir. 1988) (Rule 59(e) motions "cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the summary judgment motion. . . . Nor should a motion for reconsideration serve as an occasion to tender new legal theories for the first time.") (quoting *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987)); *FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (Motion to alter or amend the judgment, filed after summary judgment entered, "cannot be used to raise arguments which could, and should, have been made before the judgment issued" or "to argue a case under a new legal theory.")

These rulings are consistent with this Court's modern summary judgment holdings that require a party against whom a motion for summary judgment has been filed, to come forward with proof rather than resting on the allegations of the complaint. Thus, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986), this Court wrote:

> In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), we affirmed a grant of summary judgment for an antitrust defendant when the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." We observed further that "[i]t is true that the issue of material

> fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting a claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." 391 U.S. at 288-289.
>
> We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get a jury without "any significant probative evidence tending to support the complaint." *Id.* at 290.

See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The policy evidenced by *Anderson*, *Celotex* and their progeny is consistent with the result reached in this case by the Eighth Circuit. When faced with a properly supported motion for summary judgment, Chalmers was obligated to come forward with proof, arguments and legal theories to avoid imposition of the summary judgment. It did not do so, and it cannot attempt to cure those deficiencies through a Rule 59(e) motion to alter or to set aside the judgment after summary judgment has been entered.

B. The Eighth Circuit Opinion Does Not Conflict With Any Opinion of this Court or of Another Circuit.

The petition argues that the Eighth Circuit's decision is inconsistent with this Court's holding in *Foman v. Davis*, 371 U.S. 178 (1962), and numerous decisions of other courts of appeal. Petition at 20-24. The petition also

argues that the Eighth Circuit's opinion renders a different outcome than this Court's decision in *Perma Life*. An analysis of the cases relied on by Chalmers, however, reveals that the Eighth Circuit opinion does not conflict with any substantive rule of law contained in any opinion of this Court or any court of appeals.

1. *Foman v. Davis*

GST does not dispute that in *Foman v. Davis*, this Court admonished that the mandate of Rule 15(a) – that leave to amend "shall be freely given when justice so requires" – is to be heeded. 371 U.S. at 182. Although *Foman v. Davis* is distinguishable because it involved a motion for leave to amend filed after a dismissal for failure to state a claim, while this case involves a summary judgment, Chalmers faces an even larger hurdle: Chalmers *never* filed a Rule 15(a) motion for leave to amend in the district court.

Chalmers' attempts to sidestep this fatal flaw initially by obfuscating the procedural history of this case in district court and then by two more direct, although inconsistent, ways. Chalmers asserts that leave to amend was requested by paragraph 65 of the complaint. Petition at 17, 24. That paragraph of the complaint, however, is nothing more than a boiler plate attempted reservation of a right to amend – it does not constitute a motion for leave to amend as envisioned by Rule 15(a).

Chalmers also asserts that it would have been futile to seek amendment in the district court because the district judge refused to recognize *Perma Life*. Petition at 18-19. This argument ignores the fact that Chalmers did

not present its *Perma Life* argument to the district court until after summary judgment was entered. The argument is further belied by the fact that Chalmers did not request leave to amend or suggest that amendment should be given in its briefs or argument to the Eighth Circuit. Only after the entry of the Eighth Circuit's opinion affirming summary judgment did Chalmers suggest – through a petition for rehearing and petition for rehearing en banc – that an amendment should be granted. One might question why Chalmers contends that the Eighth Circuit should have invited it to amend (Petition at 17) when Chalmers itself had never before sought or suggested an amendment.

2. *Perma Life*[7]

Perma Life is, of course, an important case because it declared that the doctrine of *in pari delicto* is not available as a defense in private antitrust actions. 392 U.S. at 138-141. This case, however, does not involve the doctrine of *in pari delicto*.

In *Perma Life*, the district court had entered summary judgment in favor of defendants (respondents in this Court) with respect to all claims, although the Court's opinion does not disclose the grounds relied on by the district court. *Id.* at 135-136. The court of appeals reversed

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[7] The petition incorrectly states that GST has never attempted to distinguish *Perma Life* in any of its prior briefing. Petition at 24. Chalmers apparently overlooks the fact that GST's Brief of Appellee in the Eighth Circuit noted Chalmers' misapplication of *Perma Life* and adopted the argument of TMS's Brief of Appellee at 22-24. *See* GST's Brief of Appellee at 7.

the judgment on a Robinson-Patman claim but affirmed the district court's ruling on the other antitrust claims on two grounds: (1) plaintiffs' claims were barred by the doctrine of *in pari delicto*, and (2) the two corporate defendants – Midas and International – while functioning as separate corporations, had common ownership and, therefore, could cooperate without creating an illegal conspiracy. *Id.* at 136. Having declared the doctrine of *in pari delicto* unavailable as a defense in a private antitrust action, the Court then turned to the alternative "no conspiracy" ruling of the court of appeals.

The Court first held that because respondents – Midas and International – availed themselves of the privilege of doing business through separate corporations, the fact of common ownership would not insulate them from forming a combination or conspiracy. *Id.* at 141-142. The Court then noted that in any event each petitioner could charge a combination between Midas and himself as of the time he unwillingly complied with the restrictive franchise agreement. *Id.* at 142. Although the *Perma Life* opinion does not disclose the content of the plaintiff's complaint, the respondents apparently argued that neither theory of conspiracy was alleged with sufficient particularity in the complaint. Apparently because the case was to be remanded in any event, the Court found that respondents would be in no way prejudiced if petitioners were permitted to rely on these alternative theories of conspiracy.

In this case, pursuant to the Eighth Circuit opinion, the case was not to be remanded to the district court on any conspiracy theory, much less alternative theories. Moreover, permitting a plaintiff to rely on alternative

theories of conspiracy is vastly different than permitting a plaintiff to rely on a new theory or argument raised for the first time after summary judgment has been entered. The latter would clearly undermine the summary judgment procedure embodied in this Court's decisions in *Anderson* and *Celotex* discussed at pages 13-14, *supra*.

To the extent that Chalmers asks the question why it should receive different treatment than the petitioner in *Perma Life*, there are several answers. First, *Perma Life* involved the important issue of whether the doctrine of *in pari delicto* could be used as a defense in private antitrust cases and reversal and remand of the case was significant to that aspect of the Court's ruling. Second, since *Perma Life*, there have been changes in both substantive and procedural aspects of the law. The Court's ruling in *Perma Life* that separate corporate entities under common control can form an antitrust combination or conspiracy would be decided differently today. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Likewise, the procedural law on summary judgment has changed as reflected by this Court's rulings in *Anderson* and *Celotex*. Given these distinctions, the Eighth Circuit's opinion cannot be said to be in conflict with any significant or viable holding of *Perma Life*.

3. Other Courts of Appeals

Although Chalmers argues that conflicts exist between various circuit courts or within the same court of appeals, its complaint is really directed at the application of a properly and consistently stated principle of law to the facts of its case. Chalmers cites no opinion from

another court of appeals with which the Eighth Circuit's opinion allegedly conflicts. Moreover, a conflict within the same court of appeals is not normally a basis for granting a petition for writ of certiorari. *See* SUP. CT. R. 10(a) (One basis for review is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *see also* ROBERT L. STERN, SUPREME COURT PRACTICE § 46 (7th ed. 1993); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (recognizing that "[i]t is primarily the task of the Court of Appeals to reconcile" conflicting decisions between two different panels.)

Indeed, no such conflict really exists in the cases cited in the petition. By way of example, although the petition suggests that the Seventh Circuit has, in effect, established a "double standard" for testing the sufficiency of pleadings, the cases cited do not support that position. The petition cites *Goren v. New Vision International, Inc.*, 156 F.3d 721 (7th Cir. 1998) as involving a more liberal pleading standard and suggests that *Transamerica Financial Services, Inc. v. Sykes*, 171 F.3d 553 (7th Cir. 1999) reflects a conflicting, more stringent standard.

Goren involved a motion to dismiss a RICO complaint for failure to plead fraud with specificity and for failure to state a claim pursuant to Rule 12(b)(6). 156 F.3d at 725. In that context, the Seventh Circuit suggested by footnote that where the plaintiffs alleged the violation of a statutory provision, the court should review the subsections of that statute to determine whether a claim is stated. *Id.* at 730 n.8. The Seventh Circuit went on to affirm the dismissal of the trial court. *Id.* at 733. On the other hand,

Transamerica Financial Services involved a motion for summary judgment granted in favor of the defendants by the district court. 171 F.3d at 554. On appeal, the plaintiffs sought reversal, in part, based on a different subsection of the statute than that argued to the district court. In that context, the Seventh Circuit stated:

> While a complainant need not specify her theory of liability in a complaint, neither must a court search the United States Code for provisions which might be relevant to a plaintiff's case. "It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal."

171 F.3d at 555 (citations omitted).

In short, these Seventh Circuit cases simply involve different standards applicable to motions to dismiss under Rule 12(b)(6) and motions for summary judgment. Application of the summary judgment standard is consistent with the result reached in the present case.

C. The Petition Advances No Reason Why the ADDICA Ruling of the Eighth Circuit Should Be Reviewed.

As previously noted, the petition completely ignores the primary ruling of the Eighth Circuit that Chalmers' ADDICA claim is barred by the doctrine of *res judicata*. *See* pages 9-10, *supra*. The petition cites no opinion of this Court or any court of appeals with which this ruling is alleged to be in conflict. Accordingly, there is no reason

advanced that would justify this Court's review of the Eighth Circuit's ruling on Chalmer's ADDICA claim.

CONCLUSION

The Eighth Circuit's disposition of this case is consistent with this Court's modern summary judgment practice. The petition for writ of certiorari largely ignores the critical fact that the primary argument advanced here regarding the *Perma Life* conspiracy theory was raised for the first time after entry of summary judgment. Moreover, even though the petition urges that Chalmers should be permitted to amend, no motion for leave to amend was filed with the district court or even suggested to the district court or Eighth Circuit until after the summary judgment was affirmed. In short, the Eighth Circuit decision does not conflict with any important rule of law in any opinion of this Court or of any court of appeals. The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

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